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# International Convention on the Elimination of All Forms of Racial Discrimination

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**Committee on the Elimination of Racial Discrimination**

## Consideration of reports submitted by States parties under article 9 of the Convention

### Thirteenth to fifteenth periodic reports of States parties due in 2012

## Namibia*

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* The present document is being issued without formal editing.

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# Contents


| | | *Paragraphs* | *Page* |
|---|---|---|---|
| | Foreword | 1–3 | 3 |
| I. | Introduction | 4–6 | 3 |
| II. | Reporting methodology | 7 | 4 |
| III. | Part I: Responses to the concluding observations of the Committee on the Elimination of Racial Discrimination following Namibia's report during 2008 | 8–118 | 4 |
| IV. | Part II: Information on the substantive rights recognized under relevant articles of the Convention | 119–203 | 22 |
| | Article 1 | 119 | 22 |
| | Article 2 | 120–150 | 22 |
| | Article 3 | 151–152 | 30 |
| | Article 4 | 153–183 | 30 |
| | Article 5 | 184–208 | 35 |
| V. | Other civil rights | 209–302 | 38 |
| | Article 6 | 303–311 | 51 |
| | Article 7 | 312–341 | 53 |
| | End Notes references | | 58 |

## Foreword

1. Namibia has the honour to present its thirteenth to fifteenth International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) periodic report to the treaty body in line with article 9 of said Convention. Namibia remains committed to the unrelenting fight against all forms of racism, xenophobia and other forms of discrimination. Namibia endured more than a century of brutal, racist and apartheid rule. The legacy is still present and the impact thereof can still be felt more than two decades after independence. Under its constitution, Namibia strives to ensure that all its citizens are treated equally and with dignity irrespective of skin colour, religion, tribe, creed and gender.

2. To combat the scourge of racism and discrimination, the Namibian government has, since independence, enacted several pieces of legislation aimed at eradicating all forms of discrimination and addressing past colonial injustices. The Constitution of Namibia, which is the supreme law of the country, provides remedies for victims of racial discrimination and other forms of discrimination. Among the legislation enacted to fight racism and address past injustices and discrimination are, respectively, the Prohibition of Racial Discrimination Act of 1991 and the Affirmative Action (Employment) Act of 1998.

3. Namibia is a multicultural society. At independence, the Namibian Government adopted a policy of national reconciliation to unite and/or inculcate a sense of unity among its people. Namibia has from time to time participated in international seminars and conferences against all forms of discrimination and other intolerances. Namibia is a party to the Durban Declaration against racism, racial discrimination, xenophobia and related intolerance. Namibia pledges to continue working with national, regional and international bodies/organizations to eliminate all forms of racial discrimination and to foster an atmosphere of tolerance among all the peoples of the world.

# I. Introduction

4. Namibia is a State party to a number of conventions and treaties commonly referred to as international human rights instruments, including ICERD (hereinafter "the Convention"). Namibia ratified the Convention in 1982, when the United Nations Council for Namibia, as the then legal administering authority for Namibia ratified the instrument on behalf of the future Government of Namibia. The list of the major instruments is annexed hereto.

5. This report is submitted pursuant to article 9 of the Convention, which requires each State party to submit a report within one year after the entry into force of the Convention for the State concerned, and subsequent thereto, every two years on legislative or other measures taken with a view of giving effect to the rights and freedoms recognized and guaranteed by the Convention. The information contained in this report covers the period from 2008 to 2012. Namibia welcomes the position of the Committee to accept that the thirteenth to fifteenth periodic reports be combined and submitted as one document.

6. The report includes an initial section which presents information on the reporting methodology. Part I of the report provides information and responses to the concluding observations and recommendations of the Committee on the Elimination of Racial Discrimination, which were made following consideration of Namibia's eighth-twelfth periodic report in 2008. Part II of the report contains information on the substantive rights recognized under relevant articles of the Convention and the measures taken to implement them.

## II. Reporting methodology

7. In order to meet and respect its international obligations, Namibia established an Inter-Ministerial Committee on Human Rights and International Humanitarian Law, which consists of all Ministries/Agencies responsible for the implementation of human rights standards contained in the Convention. The operations of the offices are coordinated by the Ministry of Justice. This report was prepared and compiled by the Ministry of Justice based on information received from all Government Ministries, research information and reports from relevant non-governmental organizations (NGOs). The report was submitted to the NGOs for their information and comments.

## III. Part I: Responses to the concluding observations of the Committee on the Elimination of Racial Discrimination following Namibia's report during 2008

### Concerns and recommendations

#### Recommendation No. 9

8. The Committee notes with concern the paucity of socio-economic data provided in the current report and underlines the importance and value it attaches to such data.

**The Committee recommends that the State party take all necessary measures to ensure that socio-economic data relevant for the monitoring of the Convention is available in the next report. In this connection, the Committee draws the State party's attention to paragraphs 10 to 12 of the reporting guidelines for the CERD-specific document adopted at its seventy-first session.**

#### In response

9. The 1991 Population and Housing Census estimated the Namibian total population to be 1,409,920 inhabitants. The Namibian population increased from that number to 1,830,330 people in 2001, according to the Census results of that year (2001 Population and Housing Census), representing a growth rate of about 2.6%.

10. The 2001 Census results reveal that 942,572 are female and 887,721 are male. 97% of the residents are Namibian and only 3% are non-Namibian. It was estimated that 67% of the population lives in rural areas and only 33% lives in the urban areas. 26% of the total population is under 14 years of age, 52% is between 15 and 59 years of age and 7% is 60 years of age or older.

11. About 81% of the population 15 years of age or older is classified as literate because they could read and write with understanding in any of the Namibian languages. The 2011 Population and Housing Census estimated the population at approximately 2.1 million. The National Housing and Population Census is undertaken every ten years.

12. In terms of ethnicity, 87.5% of the population is black, 6.5% are of mixed race and 6% are whites. English is the official language but Afrikaans is a common language in most cities and towns. German and other local languages – including Ju/hoasi, a minority San language, among others – are also spoken and taught at the lower primary school level as a medium of instruction for the first three years of education. After grade 3, English becomes the medium of instruction, with the mother tongue as a subject throughout the schooling period.

13. Namibia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples of 2007. In addition to the Bantu majority, there are large groups of Khoisan (such as Nama and San), who are descendants of the original inhabitants of Southern Africa. There are approximately 35,000 San people in Namibia.

14. Despite its small population, Namibia is rich in culture and traditions. Like many African countries, it has diverse ethnic groups, such as Aawambo, Kavango, OvaHerero, Caprivian, Damara, Nama, Tswana, German, San, Afrikaner, Baster and Coloured. Parliament has enacted the Traditional Authorities Act (Act No. 25 of 2000) for all indigenous groups to provide for the establishment of traditional authorities and the designation, election, appointment and recognition of traditional leaders. The Government has recognized 50 Traditional Authorities in terms of the Act, and these also include five San ethnic groups.

15. Cultural expression reflects the many different groups that coexist in the country. Namibian cultural groups perform traditional dances to rhythmic drum beats. The Ministry of Youth, National Service, Sport and Culture has been particularly active in promoting culture in the country. Cultural development is further promoted by institutions such as the National and Mobile Museum, Museum Association of Namibia, National Theatre of Namibia, College for the Arts, and the Arts Department at University of Namibia (UNAM).

16. The capital city Windhoek, as well as the coastal towns, being the centres of commerce, attract more and more young people looking for employment. The Khomas region is the most populated region after the north-central regions of the country. As noted above, English is the official language in terms of article 3(1) of the Namibian Constitution. Other languages also spoken are: Oshiwambo (51.9%), Rukavango (11.8%), Otjiherero (8.1%), Silozi (4.9%), Setswana (0.3%), Damara/Nama (10.5%), and San languages (1.5%), as well as Afrikaans (9%). In view of its cosmopolitan character, other languages from around the world are also spoken in Namibia, and among the European languages spoken in Namibia are German, Portuguese, Spanish and French.

**Recommendation No. 10**

17. While noting with satisfaction that, according to article 144 of the Namibian Constitution, the Convention is directly applicable by Namibian courts, the Committee is concerned that the definition of racial discrimination in the Racial Discrimination Prohibition Act of 1991 is not completely consistent with article 1 of the Convention.

**The Committee recommends the State party to ensure that its domestic law conforms to the Convention. The State party is also encouraged to strengthen its efforts to provide training for judges and lawyers to increase their awareness of the content and the direct applicability of the Convention at the national level.**

**In response**

18. The Government of Namibia has continued its efforts to take measures to ensure that its domestic law conforms to the international agreements ratified by Namibia. The State party has noted the Committee's concern regarding the definition of racial discrimination in its domestic law. In this regard, the Law Reform and Development Commission is working on amendments to the Racial Discrimination Prohibition Act.

**Recommendation No. 11**

19. While noting the establishment of a Law Reform and Development Commission which is charged with, inter alia, the review of discriminatory laws dating back to colonial times, the Committee reiterates its concern about the discriminatory character of some Namibian laws that remain in force, including with regard to the administration of intestate

inheritance. It also remains concerned about aspects of customary laws of certain ethnic groups on personal status that discriminate against women and girls, including laws pertaining to marriage and inheritance. (Arts. 2 and 5(d)(iv) and (vi).)

**The Committee urges the State party to review its laws with a view to removing discriminatory laws in order to provide equal protection and treatment to all persons. Recalling its general recommendation No. 25 (2000) on gender-related dimensions of racial discrimination, the Committee recommends in particular that the State party urgently ensure that its laws, especially on marriage and inheritance, do not discriminate against women and girls of certain ethnic groups. It invites the State party to consider introducing a system which allows individuals a choice between customary law systems and the national law while ensuring that the discriminatory aspects of customary laws are not applied.**

**In response**

20. Namibia has undertaken a lengthy and a thorough review of both policy and legislation to eliminate most vestiges of colonial discrimination. Namibia also has a progressive judiciary which has actively defended the constitutional rights of its citizens. Parliament has already taken notice of the continued discrimination and difficulties of customary marriages, despite the fact that article 66 of the Namibian Constitution recognizes both customary law and common law on equal footing to the extent that both (customary and common) laws are not in conflict with the Constitution or statutory law.

21. Parliament has enacted the Traditional Authorities Act (Act No. 25 of 2000), and Community Courts Act (Act No. 10 of 2003) respectively to recognize and give traditional communities the choice to follow their customs, traditions and laws.

22. The report on Intestate Succession which seeks to eliminate racial discrimination succession laws was finalized and handed over to the Minister of Justice in June 2012.

**Recommendation No. 12**

23. The Committee notes with appreciation the State party's intention to increase the budget allocated for special measures, but remains concerned that not all communities might benefit in practice from these programmes. While noting the State party's assertion that it consults the affected communities when devising special measures, it is concerned by the existing perception that these programmes are imposed without consultation and active participation of these communities. (Arts. 2 (2) and 5 (c).)

**The Committee encourages the State party to engage in a data-gathering exercise to ensure that special measures are designed and implemented for all beneficiary communities on the basis of their prior consultation and active participation, and that they will not result in the maintenance of unequal or separate rights for those groups after the objectives for which they were taken have been achieved.**

**In response**

24. The Namibian Constitution provides for the right to equality (art. 10) and affirmative action (art. 23) to empower those who were previously discriminated against, as well as catering for the right of participation of women. It requires the state to "encourage the mass of the population [...] to influence Government policy by debating its decisions".

25. As far as participation and consultation is concerned, in Namibia, the practice is that the national Government is responsible for planning and drafting of policies and development plans, which includes special programmes for the communities. The Local Authorities and Regional Councils are responsible for the implementation of policies and

development plans. Indigenous peoples in Namibia have the right to participate and to influence Government policies that affect them. This happens, inter alia, through their own traditional authorities, community meetings and regional and local government structures.

26. After the Deputy Prime Minister visited most San communities across Namibia to consult them on their needs and challenges, the San Development Programme was introduced in 2005. These visits were aimed at consultations with the San people on their needs and their perceptions of the pressing challenges facing them. The Programme was adopted on the basis of revelations of the consultations regarding the plight of the San people. During these visits, the San communities were given the opportunity to express themselves in providing first-hand information on their needs, aspirations, challenges and setbacks in their social and economic survival and emancipation. Government continuously consults through the existing structures through the annual visits conducted by the Office of the Prime Minister. The impact of Government efforts in this regard are often hampered by lack of cooperation between community members and their leaders.

**Recommendation No. 13**

27. The Committee notes with appreciation the legal provisions regarding the desegregation of the educational system. However, it remains concerned about the persistence of de facto discrimination regarding access to education, as well as the high illiteracy rate that continues to exist among marginalized parts of the population. (Arts. 3 and 5 (e) (v).)

**The Committee urges the State party to strengthen the implementation of its laws and policies aimed at the desegregation of education. In particular, the State party should increase its efforts aimed at reducing illiteracy, especially among the most marginalized communities. It requests the State party to provide, in its next periodic report, information on the impact achieved by these measures.**

**In response**

28. After independence, the Government abolished most discriminatory laws and policies including the desegregation of the educational system. In addition, the Government has adopted a special programme for speedy integration of marginalized communities into the mainstream of the economy. Under this programme, learners from the marginalized communities have free access to education and receive assistance to support them with all their needs while attending school. Namibia is combating racial discrimination in primary schools through the social studies curriculum (grades 4-7) which addresses civil values, rights and responsibilities, causes of change and development that influence a peaceful and harmonious life in the family, community, country and the world.

**Recommendation No. 14**

29. The Committee is concerned that the 1998 Racial Discrimination Prohibition Amendment Act restricts the scope of the original law regarding the prohibition of hate speech by limiting the possibility to prosecute such acts only as crimen injuria. It regrets that it did not receive any information on concrete measures taken to ensure that verbal attacks on minority groups by Government officials or other actors are subject to sanctions. (Art. 4.)

**The Committee recommends that the State party review its laws in order to prevent, combat and punish hate speech with a view to upholding the provisions of article 4 of the Convention. Recalling its general recommendation No. 15 (1993) on article 4 of the Convention, the Committee reminds the State party that the exercise of the right to freedom of opinion and expression carries special duties and responsibilities, and that**

**the prohibition of the dissemination of ideas based on racial superiority or racial hatred is compatible with the right to freedom of opinion and expression. The State party is urged to take firm action to counter any tendency to target, stigmatize, stereotype or profile persons and communities on the basis of race, colour, descent, or national or ethnic origin, especially by politicians.**

**In response**

30. Namibia has taken note of the Committee's concern and is in the process of reviewing the relevant legislation in a view to prevent, combat and punish hate speech.

31. The issue of racial comments came before our courts in 1995. *Kauesa v. Minister of Home Affairs* 1995 NR 102 (HC). In this case, Kauesa, a junior police officer appeared on national television and made racial comments against white police officers. The High Court stated that freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination and legislation enacted in accordance with the Namibian Constitution, namely the Racial Discrimination Prohibition Act of 1991 and that a corollary to these was a prohibition on hate or racist speech, which the court defined as speech inciting hatred and prejudice on the grounds of race, colour, ethnic origin, creed or religion. The Court gave a number of compelling reasons why hate speech was not protected under the mantle of the freedom of speech and expression.

**Recommendation No. 15**

32. The Committee notes with concern that it did not receive sufficient information on the status and situation of refugees and asylum seekers in the State party, in particular with regard to their right to identity documents and the requirement for refugees and asylum seekers to reside in special camps, unless a special permit is granted. (Arts. 5 (a) and (d)(i).)

**The Committee urges the State party to respect the right to freedom of movement of refugees and asylum seekers within the borders of the State party's territory, as well as their right to identity documents, including by issuing official birth certificates to newborn children of asylum seekers and refugees.**

**In response**

33. Namibia acceded to the United Nations Convention relating to the Status of Refugees of 1951 as well as the Protocol relating to the Status of Refugees of 1967. Parliament passed legislation in the form of the Refugees (Recognition and Control) Act of 1999 to give effect to these international instruments. This Act provides for the protection of asylum seekers and subsequent granting of refugee status depending on the circumstances of the individual asylum seeker. However, asylum seekers who fled Angola during the civil war were given prima facie refugee status.

34. The Government made reservations to article 26 of the 1951 Convention to enable the Government to legally restrict the free movement of refugees and asylum seekers in Namibia.

35. In terms of this reservation, Namibia has the right to designate a place or places for principal reception and residence for refugees or to restrict their freedom of movement. However, should any refugee or asylum seeker find an employment or study opportunity outside the refugee settlement, the Government always grants them study/employment permits to do so. In practice, the Government provides protection to refugees against expulsion or return to countries where their lives or freedom would be threatened.

36. The Government allows the refugees to leave the refugees settlement up to 14 days or more, depending on the reasons given by whoever wishes to visit a specific place,

whether inside the country or outside the country. Their movements are regulated via the office of the Camp administrator situated within Osire Refugees Settlement. This is mainly done to safeguard their well-being and protection while they are away from the settlement. There are transport minibuses within Osire Refugees Settlement which take the refugees to and from the nearby town of Otjiwarongo on a daily basis for shopping for their basic needs.

37. With regard to the issue of their right to identity documents and issuing of official birth certificates to newborn children of asylum seekers and refugees, the Ministry of Home Affairs and Immigration introduced an electronic database system for identity documents in early 2009. Children born to refugees and asylum seekers have been issued full birth certificates since late 2009. There is a hospital at the nearby town of Otjiwarongo where newly born babies, including those born to refugees and asylum seekers, can be issued with full birth certificates before their mothers are discharged from maternity wards, provided that the parents of the newly born refugee babies are refugees.

38. The Namibia Refugees (Recognition and Control) Act of 1999 provides for the rights of refugees. The Act stipulates that refugees who apply for refugee status in Namibia and every member of their family have the right to remain in Namibia pending the granting of refugee status. Once refugee status is accorded, the refugee may remain in Namibia as a recognized refugee.

39. Before the voluntary repatriation of Angolan refugees started in May 2012, there were approximately 8,500 refugees and asylum seekers resident in Namibia. Since the voluntary repatriation programme was started for Angolan refugees, 2,761 Angolan refugees have been repatriated. In addition, three Rwandese and four Burundian refugees have also been repatriated voluntarily. This brings the total of voluntary repatriations to 2,768. The Angolan refugees represent 75% of the refugee population.

**Recommendation No. 16**

40. The Committee regrets that it did not receive sufficient information on the criteria used by the State party to recognize traditional leaders under the Traditional Authorities Act of 2000 as well as the Council of Traditional Leaders Act of 1997, including on whether the scope of the laws includes all indigenous communities. It is therefore particularly concerned that no institution exists to assess applications for recognition independently of the Government. (Art. 5 (b).)

**The Committee requests the State party to provide, in its next periodic report, information on the criteria used for the recognition of traditional leaders. The State party should ensure that the criteria used for the recognition of traditional leaders under the Traditional Authorities Act of 2000 are objective and fair and that their application process is monitored by an independent body charged with assessing the legitimacy of applications for recognition by indigenous groups.**

**In response**

41. Parliament passed the Traditional Authorities Act (Act No. 25 of 2000) which regulates the recognition of traditional leaders in Namibia. Section 2 (1) of the Act stipulates that every traditional community may establish a traditional authority consisting of a chief or a head of a traditional community, who should be designated and recognized in accordance with the Act, as well as senior traditional councillors and traditional councillors appointed or elected in accordance with the same Act.

42. Section 5 of the Act provides that any traditional community that intends to designate a chief or a head of a traditional community in terms of the Traditional Authorities Act should apply on the prescribed form to the Minister of Regional, Local Government, Housing and Rural Development for approval to make such designation and should state the following particulars:

- Name of the traditional community;
- The communal area inhabited by that community;
- The estimated number of members comprising such community;
- The reasons for the proposed designation;
- Particulars of the candidate to be designated as chief or head of the traditional community.

43. The customary law is applicable in that community in respect of such designation and such other information as the Minister may prescribe or require.

44. If the application complies with the above-mentioned requirements the Minister may approve the proposed designation.

45. If the application does not meet the above requirements and conditions, the Minister advises the President accordingly. In turn, the President refers the application to the Council of Traditional Leaders, which is established in terms of Section 2 of the Council of Traditional Leaders Act (Act No. 13 of 1997) and its Amendment Act (Act No. 31 of 2000), to advise the President on any matter he may refer to it. The Council of Traditional Leaders is composed of members from all the recognized traditional authorities as provided for in Section 3 of the Council of Traditional Leaders Act.

46. The Council of Traditional Leaders investigates the application and makes recommendations to the President, who may grant or disapprove the application of such designation.

47. An application that meets the requirements of the Traditional Authorities Act is approved by the Minister or by the President, as the case may be, and the designation is recognized by the President by proclamation in the Government Gazette in terms of Section 6 of the Traditional Authorities Act.

48. So far, the Government has recognized 50 traditional authorities, which include the following five San traditional communities:

- Jul'haon Traditional Authority;
- Kung Traditional Authority;
- Hai-//om Traditional Authority;
- Kao-//'aesi Traditional Authority;
- Xoo Traditional Authority.

49. The last two traditional authorities were recognized despite the fact that they do not have their own traditional communal land.

**Recommendation No. 17**

50. The Committee acknowledges the difficulties within a democratic system in implementing land reform policies with a view to addressing existing imbalances. However, it is concerned about the apparent lack of clear and transparent criteria for the

redistribution of land in practice, and notes with concern the paucity of information concerning the implementation of relevant policies in this field. (Art. 5(d) (v).)

**The State party is encouraged to implement its policies on land reform in such a way to ensure the equal exercise by the different ethnic communities of the rights enshrined in the Convention within the framework of a democratic system. The Committee invites the State party to provide information on the measures taken to ensure the implementation of land reform policy and particularly its impact on vulnerable groups.**

**In response**

51. Namibia is divided into 13 administrative regions of which five are communal land, and every Namibian has right to reside anywhere in the country. The Government, through the Ministry of Lands and Resettlement, embarked upon land reform in 1990, with the Ministry being mandated to be the main custodian and actor for Government in planning and administering Namibia's land resources and ensuring equitable distribution thereof.

**Land reform policies**

52. Namibia is characterised by skewed land ownership and distribution patterns inherited from the colonial past. Consequently, approximately 70% of Namibians, mostly blacks, previously disadvantaged, live in communal land which constitutes 43% of the total land mass. In an effort to correct these past imbalances, the Government adopted various guidelines, policies and legislation which guide the Ministry of Lands and Resettlement in implementing land reform. These include:

(i) National Land Policy of 1998, established based on the fundamental principles stipulated in the Namibian Constitution;

(ii) National Resettlement Policy, established with the aim that the resettlement programme contributes to and ensures that the target groups are allocated land and their welfare and livelihoods are enhanced and beneficiaries become self-reliant;

(iii) The Agricultural (Commercial) Land Reform Act, No. 6 of 1995 (ACLRA of 1995), enacted for the purpose of acquiring agricultural land by the State for the purpose of land reform and allocation of such land to landless Namibians;

(iv) The Communal Land Reform Act, No. 5 of 2002 (CLRA of 2002), enacted to make provision for the purpose of allocating rights in respect of communal land such as customary land rights and rights of leasehold.

53. The Government applies the provisions made in the ACLRA of 1995 to acquire agricultural (commercial) land for the purpose of land reform. Section 14 of the Act makes provision for the willing seller–willing buyer policy, whereby the seller can offer the farm to the State and the two parties negotiate and agree on the price. Section 20 empowers the Government through the Minister responsible for land matters to acquire land through expropriation and the owner of the expropriated land is compensated.

54. Since the implementation of the Act, both processes have not been very effective in acquiring land. Farm owners are not coming forth positively to offer their land to the State through the willing seller–willing buyer system. The Government also has been challenged in the courts of law, when Government attempted to acquire agricultural land through expropriation. More farms are offered mainly from the two southern regions that are not suitable for resettlement, and/or farms are offered at an exorbitant price in productive areas.

55. However, the Government has introduced a "farm price negotiation committee" as a mechanism of improving the process of acquiring land through the willing seller willing buyer approach, whereby farm owners who offer their farms to the State are invited to negotiate and agree with the Government on the prices of their farms.

56. To improve the expropriation process, the Ministry has finalised the expropriation criteria and policy guidelines and incorporated them in the Agricultural (Commercial) Land Reform Amendment Act, which has yet to be enacted by Parliament

57. The resettlement programmes are implemented in line with the Agricultural (Commercial) Land Reform Act, Act No. 6 of 1995 and the National Resettlement Policy. In its quest to provide answers to the landless Namibian's needs in terms of land, the Government categorizes settlers into three groups. These are:

(a) People who have neither land, income nor livestock;

(b) People who have neither land nor income, but some livestock;

(c) People who have no land, but have income or are livestock owners, but need land to be resettled on with their families and to graze their livestock.

58. In addition, the Government through the Ministry of Lands and Resettlement has prioritized resettlement beneficiaries in its National Resettlement Programme which include the vulnerable groups of our society. The main target groups are:

(i) San people, who are some of the marginalized and vulnerable groups in Namibia. The Government has made an effort to ensure that this group is streamlined into the society and that their social, educational and economic well-being are catered for. The San community is one of the main groups targeted for resettlement.

(ii) The Ministry of Lands and Resettlement has acquired land in both communal areas (five projects) and commercial areas (four projects) with the purpose of allocating it to the San community. Therefore, thus far there are nine Resettlement Projects for San people countrywide which are run by the Ministry of Lands and Resettlement. Four of the nine projects, translate into about 18,600 hectares of land acquired in the commercial area, with 358 families being resettled. Three of the five projects are in the communal area with a size of 18,333 hectares and allocated to 281 San families, while the other two projects are allocated to an average of 313 families in the form of settlement areas.

59. Between 2006 and 2010, the Ministry acquired four commercial farms of about 24,423 hectares in size and donated/gave/transferred them to the Office of the Deputy Prime Minister's Special Programme for resettlement of the San people, with about 878 families having since been resettled on these farms. During the first quarter of 2011, the Ministry handed over an additional three farms totalling 18,993 hectares to the Office of the Deputy Prime Minister. These are yet to be allocated to the San community or developed into Wildlife/Conservation/Tourism and/or any other enterprises which could benefit the San community socially and economically. This brings the number of farms donated so far to the Office of the Deputy Prime Minister to seven – six in the Kunene Region along the Etosha National Park and one in the Otjozondjupa Region. In late 2012, the Ministry of Lands and Resettlement acquired another farm of about 7,000 hectares in the Oshikoto Region and transferred it to Office of the Deputy Prime Minister purposely to resettle the San Community residing at Oshivelo. This brings the number of farms donated/given/transferred to ODPM to eight, with about 50,564.1246 hectares thus far.

**Table 1**

**Farms bought and handed over to OPM during 2006-2013: Resettlement for San Communities, particularly the Hai//Om and //Om**

| *No* | *Farm Name* | *Region* | *Year acquired & handed over* | *Size in hectares (ha)* | *Number of People Resettled* |
|---|---|---|---|---|---|
| 1 | Uitkomst | Otjozondjupa | 2006/07 | 6389.11 | 53 |
| 2 | Mooiplaas | Kunene | 2009/10 | 6538.6759 | 270 |
| 3 | Setingkop & Koppies | Kunene | 2007/08 & 2008/09 | 7967.8704 | 275 |
| 4 | Bellalaika | Kunene | 2009/10 | 3527.6445 | 280 |
| 5 | Nuchas | Kunene | 2010/11 | 6361.4237 | - |
| 6 | Werda | Kunene | 2010/11 | 6414.18 | - |
| 7 | Toevlug | Kunene | 2011/12 | 6217.6238 | - |
| 8 | Ondera/Kumewa | Oshikoto | 2012/13 | 7147.5963 | - |
| | **Total** | | | **50,564.1246** | **878** |

*NB*: The Office of the Prime Minister still has to determine the allocation of beneficiaries on farms Nuchas, Werda, Toevlug and Ondera/Kumewa.

**Recommendation No. 18**

60. The Committee is concerned about the lack of recognition of the rights of ownership of indigenous communities over the lands which they traditionally occupy or have occupied. (Art. 5 (d)(v).)

**The Committee reminds the State party of its general recommendation No. 23 (1997) on the rights of indigenous peoples, in particular paragraph 5, which calls on States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their lands and territories. It therefore encourages the State party, in consultation with the indigenous communities concerned, to demarcate or otherwise identify the lands which they traditionally occupy or use, and to establish adequate procedures to resolve land claims by indigenous communities within the domestic judicial system while taking due account of relevant indigenous customary laws.**

**In response**

61. Indigenous peoples such as the San are found in most parts of the country. There are those who are adapted to their mainstreaming into the society, particularly in communal areas in the north and north-eastern regions of the country where they have crop fields designated to them and registered under their names in accordance with the Communal Land Reform Act (No. 5 of 2002) as well as sharing the commonage. Consequently, the occupant is issued a certificate as proof of ownership. The land reform programme in communal areas was introduced in order to improve the security of tenure through existing communal land rights or customary land rights and rights of leasehold. Their rights are protected as enshrined in the Namibian Constitution and land has been set aside and allocated to them.

62. There are no indigenous peoples who have been deprived of their traditionally occupied lands after independence. Where the land was forcefully taken from indigenous peoples before independence, the Government does not make provision for claiming back "ancestral" land, but the Government strives to reverse the situation through the Land

Reform Programme as provided for in the Agricultural (Commercial) Land Reform Act (Act No. 6 of 1995).

63. As stated earlier, the Government acquired in total 11 resettlement farms for San people. Four commercial farms, namely Drimiopsis and Skoonheid in Omaheke Region, and Tsintsabis and Excelsior in Oshikoto Region, are run under the Ministry of Lands and Resettlement as Resettlement San Projects; seven farms – Uitkomst in Otjozondjupa Region; Mooiplaas, Seringkop/Koppies, Bellalaika, Nuchas, Werda and Toevlug in Kunene Region – plus Ondera/Kumewa in Oshikoto, acquired in late 2012, are administered by the Office of the Deputy Prime Minister. Other Group Resettlement San Projects run by the Ministry of Lands and Resettlement are in communal lands, namely Western Caprivi in Caprivi/Kavango Regions, Bravo in Kavango Region, Okongo (Eendobe, Ekoka, Onamatadiva and Oshanashiwa) in Ohangwena Region, Donkerbos/Sonnerbloom in Omaheke Region, Mangetti Dunes in Otjozondjupa Region. Some of the farms are divided into plots which are allocated to individual families.

64. Displaced communities have been resettled and for those who are living within the National Parks and Game Reserves, mechanisms have been put in place to ensure that they live on the land without fear, in accordance with the Nature Conservation Ordinance No. 4 of 1975.

65. Conservancies have also been established in the communal areas where indigenous people live as provided for under the Nature Conservation Amendment Act (Act No. 5 of 1996) in order to ensure that the natural resources under their jurisdictions are conserved and utilized on a sustainable basis. Namibia is hailed internationally for implementing the novel concept where the management of natural resources is in the hands of the local people under Community Based Natural Resources Management (CBNRM).

**Recommendation No. 19**

66. The Committee welcomes the statement that local communities participate in the management of new conservation areas. However, it is concerned about the ability of the local indigenous communities to pursue their traditional way of life in such parks. The Committee is also concerned that those communities whose lands were taken before 1990 have not been able to receive redress for that dispossession. (Arts. 5 (d)(v) and (e)(vi).)

**The Committee encourages the State party to strengthen its laws and policies aimed at ensuring that national parks established on ancestral lands of indigenous communities allow for sustainable economic and social development compatible with the cultural characteristics and living conditions of those indigenous communities. In cases where indigenous communities have been deprived of their lands and territories traditionally owned, the Committee recommends that the State party take steps to return those lands and territories or to provide adequate reparation measures, in accordance with paragraph 5 of general recommendation No. 23 (1997) on the rights of indigenous peoples.**

**In response**

67. Namibia's terrestrial natural resources conservation and management is categorized into two conservation areas: National Parks and Game Reserves, where management and utilization of natural resources (fauna and flora) are managed by the State/Government as provided for in the Nature Conservation Ordinance 4 of 1975, and Conservancies managed by communities residing within through the Community Based Natural Resources Management (CBNRM) Programme, as per provisions of the Nature Conservation Amendment Act No. 5 of 1996, which provides for an economic system based on the sustainable management and utilization of game in communal areas. Namibia has provision

for "ancestral" land claims, except the Land Reform Programme, Conservation and Sustainable Utilization of Natural Resources Plans in National Parks and Game Reserves, and Conservancies, with the aim to benefit displaced, indigenous people etc.

68. In National Parks and Game Reserves, which are in areas where some of the indigenous people live, the Government gives them conditional rights in terms of hunting and tourism concessions. For hunting concessions, indigenous people are authorized to practise controlled hunting to avoid misuse and illegal hunting. For example, in the southwestern part of the country in the Namib Naukluft Park, the Topnaar community live their normal lives of rearing livestock, collecting !Nara plants and *Acacia albida* (Anna Trees) ponds for their livelihood. In addition, the Topnaar community has also been given hunting and tourism (dune drive and establishing of lodge) concessions. The Meob/Nama community in the same Park has been given tourism concessions which authorize them to set up tourist campsites, and they can also enter into partnerships with any investor on terms duly scrutinized and approved by Office of the Attorney General. In Kunene Region, the displaced Damara-speaking people in the #Khoadi //Hoas Conservancy live their normal lives in harmony with wildlife within the Conservancy and have been given the Hobatere tourism concession and Government-availed funds for the construction of Grootberg Lodge.

69. In the Tsumkwe area, which is part of the Otjozondjupa Region, San people live as they used to be within Conservancies' boundaries, namely Nyae Nyae and N≠a-Jaqna, which were registered in 1998 and 2003 respectively. They are involved in the management of the conservancies. The two conservancies undertake a number of entrepreneurial initiatives such as tourism joint ventures, craft centres, trophy hunting, cultural village, devil's claw and dry wood harvesting where the San people benefit economically. The community of Nyae Nyae Conservancy is also benefiting from the Khaudum National Park, where they have been accorded a hunting concession in Buffalo Breeding Area of more than 10,000 hectares. This area is where Mangetti Dunes Group Resettlement San Project is situated, where they are involved in normal farming activities.

70. The San community found in Eastern Kavango and Western Caprivi Regions are living in the Western Caprivi Resettlement San Project within Bwabwata National Park. Due to the prohibition of forming a Conservancy within the National Parks, the Kyaramacan Association was formed which operates in close cooperation with the Ministry of Environment and Tourism to oversee the management and proper utilization of natural resources within the park by indigenous communities.

71. Institutional arrangements are well established such as the Management Committee, and local/indigenous people are employed as community game guards, resource monitors and at the campsites. The community is given hunting concessions as well two trophy hunting concessions in the park, which generate about N$ 4 million (US$ 470,588) annually. They have also been issued with a tourism concession to upgrade the current campsite to a lodge within the park. In addition, they are allowed to harvest devils claw, practise their culture and traditions and gather wild fruits. The Ministry of Environment and Tourism also plans for more future possibilities of tourism activities to take place within the park for the benefit of the San. In summary, the San people are incorporated in the management of the park and they are benefiting economically and socially.

72. In the Omaheke Region, apart from the three Resettlement San Projects (Drimiopsis, Skoonheid and Donkerbos/Sonnerblom), the Government has established the Eiseb Conservancy Core Area to be core-managed by the OvaHerero and San communities under the guidance of the Ministry of Environment and Tourism. In the Ohangwena Region, there are four Okongo Resettlement San Projects (Eendobe, Ekoka, Onamatadiva and Oshanashiwa), and the San people still practise their culture and tradition, although hunting in that part of the country is very minimal due to the fact that wildlife had been eliminated

during the colonial period. To restore wildlife in the area, the Okongo Conservancy has been established and one of its objectives is to benefit the indigenous San people.

73. The Hai//Om and //Om (San) communities, which were displaced during the establishment of the Etosha National Park and war, are also catered for. There are those who are resettled in Tsintsabis and Excelsior Resettlement San Projects in Oshikoto Region under the Ministry of Lands and Resettlement administration, as well those in three of the six acquired farms along the Etosha National Park in Kunene Region which are administered by the Office of the Deputy Prime Minister's San Development Programme. Three of the six farms acquired were handed over to the Office of the Deputy Prime Minister and that Office, together with the Ministry of Environment and Tourism, is working on a plan on how to use the farms. Other San people are resettled in the seventh farm given to ODPM which is in Otjozondjupa Region. Another farm (Ondera/Kumewa) was acquired in Oshikoto Region in late 2012 to resettle the Hai//Om and //Om (San) community residing at Oshivelo.

74. Indigenous communities in the country are therefore looked after and the Government has ensured and continues to ensure that they are brought into the mainstream of the society as well as to empower them socially and economically.

**Recommendation No. 20**

75. The Committee remains concerned that despite the special measures taken by the State party to reduce poverty and to progressively realize equal and sustainable development, discrimination on the grounds of ethnicity with regard to the enjoyment of economic, social and cultural rights persists in the State party. (Art. 5 (e).)

**The Committee recommends that the State party conduct studies with a view to assessing and evaluating the level of enjoyment of economic, social and cultural rights by the different ethnic groups in the State party, based on which the State party should strengthen its efforts in combating poverty among marginalized groups as well as its measures aimed at promoting equal opportunities for all persons.**

**In response**

76. The enjoyment of economic, social and cultural rights is guaranteed by the Namibian Constitution in terms of a number of its relevant articles, notably, article 95 (principles of State policy) and article 19 (protection of the right to enjoy, practise, profess maintain and promote any culture, language, tradition or religion).

77. In Namibia, both Government and private institutions conduct many surveys on various issues of economic and social needs, including the three major surveys which are being carried out by the Government: the National Housing and Population Census and the Namibia Household Income and Expenditure Survey (on living conditions), which take place every 10 years; and the Demographic Health Survey (to look at national health level of the country such as child health, family planning, infant child and adult mortality, nutrition and maternal health), which takes place every five years. These surveys help the Government to formulate better policies in order to address many challenges including poverty reduction.

**Recommendation No. 21**

78. The Committee acknowledges the State party's stated intention to review the development programmes currently in place, as well as the steps taken by the State party to improve the economic and social situation of the indigenous communities, including by mobile school units, scholarships for San children, and non-discrimination training for employers. However, it remains concerned about the extreme poverty of the indigenous

communities and its impact on their equal enjoyment of human rights. The Committee is particularly concerned about the high rate of HIV/AIDS infection among the San, their lack of access to identification documents, their low level of school attendance, and the comparatively low life expectancy among those communities. (Art. 5 (e).)

**The Committee recommends that the State party enhance its efforts to reduce poverty and to stimulate economic growth and development for the most marginalized groups, namely the indigenous communities, especially with regard to education and health. It requests that the State party provide, in its next periodic report, information on the active involvement of targeted beneficiaries in the decisions directly relating to their rights and interests.**

**In response**

79. Under the San Development Programme in the Office of the Prime Minister, the Government has initiated various programmes to address the issue of poverty and to stimulate economic growth and development for the marginalized communities. These include income generation projects, such as garden projects, aquaculture projects, sewing projects, bakery projects, beekeeping projects, charcoal projects and livestock allocation. In addition, student support systems have been put in place for example; scholarships, school fees, transport to and from schools, and provision of toiletries. Health and education facilities have also been established at the various resettlement farms for the marginalized communities. Access to health facilities has been improved in all the regions by providing free medication and consultations.

**Recommendation No. 22**

80. The Committee notes with concern the low level of participation in political life and, in particular, the lack of representation in Parliament as well as regional and local public authorities of the indigenous communities, particularly the San community. (Art. 5 (c).)

**The Committee recommends that the State party strengthen its efforts to ensure the full participation of indigenous communities in public affairs at all levels. It encourages the State party to revise its electoral laws with a view to encouraging political parties to broaden their appeal to ethnic minorities and to include a minimum proportion of candidates from these groups.**

**In response**

81. The electoral system in Namibia is based on a party list system from which representatives are elected to Parliament. Government has appointed deputy ministers and special advisors to the prime minister. A regional councillor was also elected to the National Council. (See sentence on the late San regional councillor). Furthermore, political parties have been urged to make sure that they include females and candidates from the marginalized communities in all elections.

82. However, one member from the San community has been elected to the National Council (second house of Parliament) as a representative of the Tsumkwe Constituency in Otjozondjupa region, of whom a majority of residents hail from the San Community.

**Recommendation No. 23**

83. The Committee is concerned about the high incidence of rape of San women by members of other communities, which seems to be caused by negative stereotypes, and it regrets the lack of detailed information provided by the State party on this issue. (Art. 5 (b).)

**The Committee recommends that the State party adopt all necessary measures to ensure prompt, thorough and independent investigations into all allegations of rape against San women. It also urges the State party to increase its efforts aimed at combating prejudices against the San and to promote tolerance and foster intercultural dialogue among the different ethnic groups of Namibia.**

**In response**

84. The high incidence of rape cases of San women occurred in the Omaheke, Oshikoto, Ohangwena, Kavango and Caprivi (Western Caprivi) regions. Complaints of rape cases against the San women by members of other communities in Namibia have been reported to the Namibian Police mainly during the period from 2007 to 2010. In most cases the victims were 16-36 years of age. Circumstances surrounding the reported cases reveal that accused persons used physical force and had sexual intercourse with victims without their consent.

85. The cases that were reported are either finalized, and/or pending before court for further police investigations.

86. The Namibian Police, the Government agency mandated with the combating and investigations of crimes, offers a specialized crime investigation course to enhance the capacity of its detectives to enable them to effectively and promptly complete investigations of reported cases.

**Recommendation No. 24**

87. The Committee, while welcoming the State party's efforts to enhance the economic and social participation of persons belonging to marginalized groups, in particular the San, notes with concern that integration policies and programmes might be detrimental to the protection of ethnic and cultural diversity of these communities. (Arts. 5 and 7.)

**Recalling that the principle of non-discrimination requires that the cultural characteristics of all ethnic groups be taken into consideration, the Committee urges the State party to ensure that its integration policies and programmes respect and protect the cultural identities of persons belonging to national or ethnic minorities within its territory. The Committee further encourages the State party to ensure the participation of these groups in the design and implementation of integration policies and programmes, at both national and local levels.**

**In response**

88. Article 19 of the Constitution of the Republic of Namibia provides that:

> "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or national interest."

89. The Ministry of Youth, National Service, Sport and Culture, through the Directorate of Arts and Culture, has been mandated to put the content of article 19 into practical terms. Much positive work in this regard has been done to promote culture and national unity and in addition increasing attention is also being given to the common national and international facets of culture in Namibia:

90. Recognition of the wide-ranging heritage in Namibia constitutes the acknowledgement of the contributions of individual communities which can be used to promote reconciliation and nation building. The Directorate of Arts and Culture is involved in efforts to implement measures to combat the feeling of inferiority or superiority among the communities in Namibia.

91. High recognition is given to the heritage of the marginalized communities in order that their sense of human dignity can be restored. The following cultural activities are being held every year throughout the country:

(a) Regional cultural festivals;

(b) National cultural festivals;

(c) Regional and national story-writing competition;

(d) Regional and national song competition.

92. Due to a lack of funds, various cultural groups are unable to participate in many cultural festivals which is a constraint to art and culture development in Namibia.

93. The Heritage Bill and the Education and Culture Bill contain policy issues. These have yet to be tabled in Parliament. Many agreements on bilateral cooperation have been entered into with other countries to provide for cultural, educational, and scientific development.

**Recommendation No. 25**

94. The Committee commends the State party for the planned increase of the financial and human resources of the Office of the Ombudsman. However, the Committee expresses its concern about the limited mandate of the Ombudsman. (Art. 6.)

**The Committee encourages the State party to take all necessary steps to strengthen the legislative mandate and the capacity of the Office of the Ombudsman, so that it effectively fulfils its mandate. The Committee, while noting that only a small number of complaints have been received, reminds the State party that this may be due to victims' lack of information about their rights and of the accessibility of legal remedies. The State party is therefore encouraged to sensitize the general public about their rights and the availability of legal remedies for victims of racial discrimination.**

**In response**

95. The Ombudsman's Office has submitted proposed amendments to the Ombudsman Act to the Minister of Justice to strengthen its human rights mandate.

96. The Ombudsman reported that the budget allocated for the promotion of human rights was increased from N$ 400,000 (US$ 47,058) in 2004 to N$ 1 million (US$ 117,647) for the year 2011-2012.

97. The Office of the Ombudsman established two more offices, one in the south of the country, in Keetmanshoop, and another office in the north, in Oshakati, to make it more accessible to the public. Another regional office in the western part of the country will soon be opened in December 2012.

**Recommendation No. 26**

98. The Committee encourages the State party to consider ratifying the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by the General Assembly in resolution 45/158).

**In response**

99. The position of the Namibian Government regarding the ratification of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families remains the same as the one submitted during the 2011 universal periodic review (UPR).

**Recommendation No. 27**

100. The Committee recommends that the State party take into account the relevant parts of the Durban Declaration and Programme of Action, adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, when implementing the Convention in its domestic legal order, particularly as regards articles 2-7 of the Convention. The Committee urges that the State party include in its next periodic report specific information on action plans and other measures taken to implement the Durban Declaration and Programme of Action at the national level. The Committee also encourages the State party to increase its efforts to actively participate in the Preparatory Committee for the Durban Review Conference, as well as in the Durban Review Conference in 2009.

**In response**

101. Over the past 10 years, the Government maintained a standing and consistent position to combat racism by involving all the citizens, and creating a conducive environment for civil societies to fight racism and discrimination, xenophobia and other intolerance.

**Measures of prevention taken, aimed at the eradication of racism, racial discrimination, xenophobia and related intolerance at the national level**

102. Parliament passed the Communal Land Reform Act No. 5 of 2002, which provides for the equal rights of women, especially black women, to apply for and be granted land rights in communal areas. Due to the enactment of the Communal Land Reform Act, women are entitled to apply for, and be granted, leaseholds or customary land rights. The law also ensures that women actively participate and serve on the Communal Land Boards. To date, there are 155 members on the Communal Land Boards, of whom 98 are men and 57 are women. Out of a total of 170 Communal Land Board members, 72 are women.

103. As a signatory to the Millennium Declaration of 2000, Namibia is participating in the process of achieving the United Nations Millennium Development Goals (MDGs), particularly MDG3, which promotes equal rights and intends to strengthen the rights of women. Namibia has recorded remarkable and positive developments in the area of poverty eradication reduction and rural development.

**Recommendation No. 28**

104. The Committee notes that the State party has not made the optional declaration provided for in article 14 of the Convention and invites the State party to consider doing so.

**In response**

105. The Government took note of the Committee's recommendation on article 14 of the Convention. A similar recommendation was made to Namibia during the country's UPR at the Human Rights Council in 2011. In this regard, the Committee might be pleased to note that Namibia already accepted the recommendation by the Human Rights Council to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights during the 17th session of the Human Rights Council (UPR). Namibia will use the opportunity to consider the declaration positively. Arrangements are being made to ratify and deposit the relevant legal instruments.

**Recommendation No. 29**

106. The Committee recommends that the State party ratify the amendment to article 8, paragraph 6, of the Convention, adopted on 15 January 1992 at the fourteenth meeting of

States parties to the Convention and endorsed by the General Assembly in resolution 47/111. In this connection, the Committee cites General Assembly resolution 61/148, in which the Assembly strongly urged States parties to accelerate their domestic ratification procedures with regard to the amendment and to notify the Secretary-General expeditiously in writing of their agreement to the amendment.

**In response**

107. The same response as provided in paragraph 28 above. Namibia appreciates the Committee's recommendations in this regard.

**Recommendation No. 30**

108. The Committee recommends that the State party's reports be made readily available to the public at the time of their submission, and that the observations of the Committee with respect to these reports be similarly publicized in the official, most commonly spoken, and indigenous languages.

**In response**

109. In order for Namibia to meet and respect its international obligations, the Government established an Inter-Ministerial Committee on Human Rights and International Humanitarian Law, which is coordinated by the Ministry of Justice. Civil societies and other local NGOs are usually consulted during the drafting process of the report for their comments and input.

110. The Ministry of Information Technology and Communication has been requested to be responsible for the publicity and dissemination of State reports in the country.

**Recommendation No. 31**

111. The Committee recommends that the State party consult widely with organizations of civil society working in the area of human rights protection, in particular in combating racial discrimination, in connection with the preparation of the next periodic report.

**In response**

112. This report was prepared by the Ministry of Justice with input from the Inter-ministerial Committee on Human Rights and International Humanitarian Law representing all the relevant line Ministries. Thereafter, the report was then sent to NANGOF, the umbrella body of the civil societies in Namibia to share it with all its members for comments and input.

**Recommendation No. 32**

113. The Committee invites the State party to submit its core document in accordance with the harmonized guidelines on reporting under the international human rights treaties, in particular those on the common core document, as adopted by the fifth inter-Committee meeting of the human rights treaty bodies held in June 2006.

**In response**

114. Please refer to the common core document HRI/CORE/NAM/2014.

**Recommendation No. 33**

115. In accordance with article 9, paragraph 1, of the Convention and rule 65 of its amended rules of procedure, the Committee requests the State party to provide information

within one year of the adoption of the present conclusions, on its follow-up to the recommendations contained in paragraphs 11, 14, and 23 above.

**In response**

116. We regret the delay and the failure to comply with article 9, paragraph 1, and rule 65 of its amendment rules of procedures of the Convention.

**Recommendation No. 34**

117. The Committee recommends that the State party submit its thirteenth, fourteenth, and fifteenth periodic reports in a single document, due on 31 July 2012, taking into account the guidelines for the CERD-specific document adopted by the Committee during its seventy-first session and that it address all points raised in the present concluding observations.

**In response**

118. Namibia welcomes the position of the Committee which accept that its thirteenth, fourteenth and fifteenth periodic reports be combined and submitted as one report on 31 July 2012.

# IV. Part II: Information on the substantive rights recognized under relevant articles of the Convention

## Article 1

### 1. The definition relating to racial discrimination

119. The Government will continue with its efforts to take measures to ensure that its domestic law conforms to the international agreements ratified by Namibia. In this regard, the programmes for Law Reform and Development Commission and Legislative Drafting in the Ministry of Justice provide research and support in the creation of new laws to remove discriminatory statutes of the apartheid era as well as drafting new legislation to conform to international standards, including the amendment to the definition of the Racial Discrimination Prohibition Act No. 26 of 1991, as amended by the 1998 Act.

## Article 2

### 2. Policy of eliminating racial discrimination in all of its forms

120. The Namibian Constitution does not explicitly provide for the protection of group rights; however article 10 of the Namibian Constitution may broadly be interpreted to guarantee such rights under its provisions that "all persons shall be equal before the law. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status". The persons protected by the provision may all be said to belong to a certain group, whether a natural one or one formed by choice.

121. Article 23 of the Namibian Constitution also prohibits the practice of racial discrimination and the practice and ideology of apartheid. Parliament also enacted a Racial Discrimination Prohibition Act No. 26 of 1991 as amended by the Racial Discrimination Prohibition Amendment Act No. 26 of 1998, in pursuance of the provisions of article 23 of the Namibian Constitution. The principal Act criminalizes certain acts and practices of racial discrimination and apartheid in relation to the use of public amenities, as well as the

provision of goods and services, immovable property, education and medical institutions, employment, associations, religious services, and the incitement of racial disharmony and victimization.

122. Namibia has NGOs that fight against racial discrimination and foster mutual understanding, such as NANGOF and the Legal Assistance Centre (LAC). The LAC is a public interest law centre that focuses mainly on civil and political rights, including the right not to be discriminated against. They have had great success in promoting and protecting these rights. The LAC also supports the Government in law reform and particularly provides input to legislation which focuses on gender issues and human rights.

123. NamRights, previously known as National Society for Human Rights, is another human rights organization which monitors the enjoyment of human rights in the country since its inception in 1989. Some of its objectives are to promote accountability, accessibility and transparency in public administration, and to promote decentralized political power based on active and full public participation.

124. The Namibian Constitution is a product of the struggle for sovereignty and human rights and is committed to the preservation of fundamental human rights and freedoms. This is reflected in its preamble, which states that Namibia is a "sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all".

125. Namibia has taken concrete measures to ensure the adequate development and protection of certain racial groups or individuals to guarantee full and equal enjoyment of human rights and fundamental freedoms. Namibia provides free education to the San people in recognition of education being a catalyst for development. In 2005, Cabinet approved the San Development Programme to allow this community to gradually regain control over their destiny and secure access to land, education, employment and equality as provided for under international human rights instruments. Since 2007, the same programme has also been extended to other groups such as the Ovatue and Ovatjimba based on their needs.

### 3. Specific and detailed information on legislative, judicial, administrative or other measures

126. Article 23(1) of the Namibian Constitution prohibits the practice of racial discrimination and the practice of the ideology of apartheid. Article 23(1) further provides that legislative measures shall be taken through enactment of an Act of Parliament which shall render the practice of racial discrimination and its propagation criminally punishable by the ordinary courts.

127. Since the coming into force of the Namibian Constitution, Parliament enacted the Racial Discrimination Prohibition Amendment Act, Act No. 26 of 1991, as amended. This is the principal legislation which criminalizes acts of racial discrimination and prohibits propagation of racial discrimination and the practice of apartheid.

128. The Ombudsman has a constitutional and statutory responsibility to call public and private institutions to order whenever they are guilty of acts of racial discrimination, as part of its mandate to promote and protect fundamental human rights.

129. The Government embraced the policy of national reconciliation at independence, and encourages mutual tolerance, acceptance and coexistence of Namibia's diverse cultural, ethnic and racial groups to live together in harmony as a single nation with a common loyalty.

130. As contemplated in article 23 of the Namibian Constitution, the Government has taken special and concrete measures to ensure the adequate development and protection of

certain racial groups or individuals, in order to guarantee them full and equal enjoyment of human rights and fundamental freedoms. In this regard, the Government has enacted legislative measures in the social, economic and cultural fields to specifically affirm and advance these groups or individuals. This is elaborated on in the text below.

131. The Government also pursues policies designed to promote the development of small businesses by making training and loan schemes available to persons who were previously disadvantaged by past discriminatory policies, so that they can set up their own businesses.

132. Other affirmative measures are applied through the procurement policies for Government services. This is done through the allocation of preference points to suppliers who hold a certain percentage of Namibian shareholdings, employment of Namibians, and those who implement affirmative action policies in their recruitment and structures of management.

133. The Government is also working on a transformational economic and social empowerment policy which is designed to promote acquisition of business interests by previously disadvantaged groups. This policy has not yet been implemented but its promotion has served as a catalyst to recent empowerment initiatives in sectors such as the insurance industry. Thus foreign-owned businesses are slowly opening up their shares for ownership, especially by black Namibians.

134. The Office of the Ombudsman, which is established under article 89 of the Namibian Constitution by an Act of Parliament, is the national institution dealing with the enforcement of human rights, including those of racial discrimination.

135. The Namibian Constitution and the Ombudsman Act No. 7 of 1990, spell out the key mandate areas and powers of the Ombudsman in regard to human rights violations, which include the promotion, protection and enhancement of respect for human rights in Namibia. The Ombudsman has been given a specific human rights mandate, making it the National Human Rights Institution and obligating the Ombudsman to report on the state of human rights in the country.

### 4. Socio-economic empowerment measures for marginalized communities

136. The Government has over the years pursued policies and implemented various programmes for the specific improvement of the living standards of persons from marginalized communities, as part of the constitutionally sanctioned measures to redress past socio-economic imbalances in the Namibian society.

137. Soon after independence, the Government recognized that certain communities needed specific empowerment programmes. To this end, various Ministries ran their own sector-specific programmes for the benefit of marginalized communities. In Namibia, the San, Ovatjimba and Ovatua were considered primary beneficiaries of Government empowerment programmes in diverse fields of socio-economic improvement. In order to provide a more accurate picture of Government programmes for these communities since the last report, we provide an overview of programmes to address the needs of the communities in the areas of access to education, access to land, access to food, economic improvement and empowerment:

#### Access to education

(i) In order to promote access to education for marginalized communities, the Government set up an Inter-sectoral Task Force to formulate policy guidelines for Educationally Marginalized Children (EMC), to coordinate the activities of NGOs, Ministries, and other stakeholders regarding EMC.

(ii) A policy document entitled "National options for educationally marginalized children" was formulated and adopted by Government in 1998. EMC include children from the San community, the Ovahimba community and children in various urban centres. Reasons for the lack of access to education for these children are mainly poverty within the families; negative attitudes of those not marginalized; and high illiteracy rates of parents, which lead to them not valuing education.

(iii) In order to ensure that the Ovahimba children get access to education, the Ministry of Education introduced mobile school units. Cooperation between the Ministry of Education and the Namibia Association of Norway made it possible to run mobile school units for the Ovahimba community in Kunene Region. This intervention was aimed at providing access to education to the Ovahimba children without uprooting them from their nomadic traditional way of life.

(iv) The project uses temporary school tents to move a school from one place to another in order to accommodate the nomadic life of the Ovahimba community. A total of eight units used as classrooms were put in place to cater for 3,755 children within the age range of six to fifteen years. Eighty teachers were identified and recruited from the Ovahimba community, and were given training in the Instruction School Certificate programme to enable them to teach at these mobile schools. In addition, seventy-three teachers have been enrolled with the Basic Education Teacher Diploma in-service programme (BETD INSET). A school feeding programme and flexible timetable is part of this intervention to encourage attendance. More than 72% of the identified children are in school.

(v) Teacher training colleges apply affirmative action in their admission policies by prioritizing enrolment of more students from the marginalized communities. To this extent, the former Windhoek and Ongwediva Colleges of Education have enrolled a significant number of Ovahimba, the San, the repatriated OvaHerero community from Botswana, HIV/Aids orphaned children and street kids. A substantial number of female students have also been admitted to all the colleges of education across the country.

**Access to land**

- The National Conference on Land Reform and the Land Question which was held in 1991 resolved that the land rights of disadvantaged communities should receive special protection. The San and other marginalized communities were specifically singled out as a target group for resettlement in the National Resettlement Policy of 2001.

- The policy provides that San communities "need to be helped in realizing a new living by developing existing skills and acquiring new ones to be able to secure their livelihood". To this end, the San have been resettled on a number of commercial farms and communal areas which the Government acquired for purposes of resettling persons who hail from previously disadvantaged communities, as contemplated in article 23 of the Namibian Constitution.

- The Ministry of Lands and Resettlement followed two distinct approaches to resettle those who need to be resettled, namely group resettlement and individual resettlement. The group resettlement scheme was the main form of Government's resettlement programme in the early 1990s.

- During that time, the Ministry was faced with a large number of landless persons, especially the San and former farm workers, who urgently needed support immediately after independence. These categories of beneficiaries were typically resettled on farms inherited from other Ministries, donated to or purchased by the Ministry.

- The Ministry had acquired some farms and offered them for emergency grazing to relief drought. However, as soon as people were allowed onto the farms, many settlers refused to leave after the drought. This made it difficult for the Ministry to plan its resettlement programme in an orderly manner.
- However, the Ministry now runs a number of project farms which represent a planned approach to group resettlement. The San community is a significant beneficiary of the Government group resettlement scheme of which nine of the group resettlement projects are benefiting them.
- The San Community empowerment projects are ongoing and have contributed to significant empowerment of the concerned groups. These programmes are now to be integrated into the national San Development Programme which has been implemented since 2005.
- The primary responsibility of the then Directorate of Resettlement (now Directorate of Land Reform and Resettlement) in the Ministry of Lands and Resettlement is to implement a sustainable and fair redistribution programme that includes the provision of amenities and facilities to effectively improve the living standards of beneficiaries, especially previously disadvantaged and destitute Namibians, notably the San people.
- For the past few years the Ministry has embarked on aggressive social and economic programmes to bring the San people into the mainstream of food and economic self-sustainability to improve their livelihoods. The objectives of the Government's projects for the San community also include the following:
    - To improve the livelihood situation of San people in the project area;
    - To enable the San to acquire necessary farming skills and improve the livestock and production capacity of community stakeholders to manage and sustainably use these resources;
    - To increase the food and income of San people in the project areas;
    - Through particular farming activities.
- The form of land use practised in all nine San Group Resettlement Projects is mixed farming-livestock (large and small stock) farming and crop production.
- The Ministry has development projects in Western Caprivi Group Resettlement Project where San communities are involved in crop production for both their own consumption and for marketing on a small scale. After the proclamation of Bwabwata National Park in 2007, livestock rearing had stopped due to national park policies which prohibit livestock farming and crop farming in the core areas of the National park. The San community are now only producing crop for their own consumption. The Ministry continues to support the project in terms of water infrastructure, housing and farming implements. These development projects still enjoy the full support of the Ministry socially and economically.
- Apart from crop production, between 2004 and 2007, the Ministry and Komeho Namibia, Ministry of Agriculture, Water and Forestry and DAPP, and RISE provided large and small stock to the San Communities at Tsintsabis in Oshikoto Region and Bravo in Kavango Region, respectively of which the large stock has exceptionally increased (from 26 to 100 and 51 to 62 for Bravo and Tsintsabis respectively). Komeho Namibia has been involved in the implementation of the projects as well as provided them with training. The aim of the project is to empower the settled San-speaking communities at both Bravo and Tsintsabis with

resources (small stock) and skills that will contribute towards the enhancement of their livelihood.

- Excelsior is another project in Oshikoto Region that the Ministry of Lands and Resettlement runs. The project was provided with the large (140) and small (12) stock between 1999 and 2001 which were reportedly increased. Poultry and ducks were also provided. MAWF trained the members in livestock management and vegetable gardening.

- Theoretical training on general goat farming and practical demonstrations on the usage of veterinary equipment, which was handed over to the elected committees, was conducted on both projects and many follow-up training sessions were conducted by Komeho Namibia Development Agency. Apart from livestock farming and crop production, the community at the two projects also engaged in other activities, namely:

    - Construction of houses (Bavaria and Ballaton houses);
    - Brick-making;
    - Gardening;
    - Dress making (mini-project);
    - Bakery;
    - Orchards – three fruit tree seedlings were provided for project members at Tsintsabis and four for Bravo project members respectively;
    - Craft Centre and Tourist Camp at Tsintsabis;
    - Carpentry, sewing, jam making and bee keeping at Bravo;
    - Literacy programme (twice a week).

- The Skoonheid, Drimiopsis and Donkerbos/Sonneblom Group Resettlement Projects are based in the Omaheke region and were administered and financed by the Government of Namibia, with cooperation and support of the implementing agency Komeho Namibia, and the Spanish Government of which Desert Research Foundation of Namibia took over from Komeho as an implementing agency. The three projects were provided with large and small stock, but only Skoonheid record an increase from 20 to 44 large stock. The aim of the project is to empower settled San-speaking communities at the three projects with resources and skills that will contribute towards the enhancement of their livelihood.

- It was essential to train beneficiaries of both resettlement farms in all subjects concerning the sale of their products. Komeho Namibia Development Agency provided training to sixteen (16) beneficiaries of Skoonheid and Drimiopsis projects. Other institutions including Spanish/DRFN, MAWF provided training to the three projects in areas of income-generating projects and management of their projects. It was expected that each project will develop its own capacity to take over its production and marketing once donor assistance stops. An amount of N$ 50,300 (US$ 5,900) was given to Komeho to train beneficiaries in all aspects of training in accordance with the San community's needs.

- The Mangetti Dunes Group Resettlement Project is situated in the Otjozondjupa Region and covers the whole area of Tsumkwe West with 25 villages of close to a 1 million hectares and is inhabited mainly by the San community, with a population increased to about 3,400. The whole of Tsumkwe West is registered as a Conservancy (N#a-Jaqna) in which almost all community members are registered as

members of the Conservancy. The project was initially run with the support and involvement of NGOs, however the Ministry of Lands and Resettlement since 1992 has taken over the running of the project. The San families were provided with livestock, they could not be accounted for; however they are engaged in crop production for the community to improve food self-sufficiency and economic sustainability. Other activities going on at the two projects include carpentry, sewing, gardening and a literacy programme and the Ministry of Environment and Tourism had donated various game species in 2007-2008.

- The Okongo Group Resettlement Project, which comprises Ekoka, Eendobe, Oshanashiwa and Onamatadiva, is a San Project which is based in Ohangwena region and is run by the Ministry of Lands and Resettlement with the assistance of the Spanish Government, plus the assistance of DFRN as an implementing agency.

- A total of 952 San families settled received arable land for crop production and gardening, as well as for them to carry on with their daily activities to improve the situation of the marginalized and previously disadvantaged San communities in terms of food and economic sustainability, to improve food self-sufficiency and self-reliance. It is expected that after a certain time of supporting this intervention, beneficiaries will be ready to take full charge of all procedures to continue marketing their products.

- The Namibian Government gave livestock and ploughs, whereas donkeys and donkey carts were given to the beneficiaries by the Spanish Government. These were distributed to the beneficiaries of the San families through the Ministry of Lands and Resettlement.

- Beneficiaries received training from different stakeholders on many farming practices in crop and livestock production. Further training was offered in the field of basket-making, knitting, gardening, blacksmithing, carpentry and brick-making. It is expected that each project will develop its own capacity for the beneficiaries to take over production and marketing affairs once the donor and Government assistance stops.

- Members of the San community enjoy regular food provision from the Government through its San feeding programme throughout the year. In addition, where conservancies have been declared and established, the San people are permitted limited hunting rights and also draw income from trophy hunting.

### 5. San Development Programme

138. The San Development Programme was introduced by Office of the Prime Minister at the beginning of 2005. The initial stages of the process included visitations by the then Deputy Prime Minister to various San communities across the country for consultations.

139. These consultations revealed that the conditions of living of the San were tragically dire, and that they lacked basic social and economic infrastructure to meaningfully participate in national development programmes and processes. The Government decided that intervention to aid the improvement of the situation of the San was necessary.

140. The Government also considered that the intervention was an essential element of Vision 2030 and a constitutional duty of Government to serve all its citizens equally.

141. The Ministry of Environment and Tourism established a tourism developmental programme targeting the Hai//Om community, one of the San language groups, which aims to improve the socio-economic status of this community through the creation of conservancies and concessions.

142. It is clear from the analysis in the foregoing section of this report that the Government has over the years run various diverse programmes for the San communities.

### 6. National Youth Service Scheme

143. The objectives of National Youth Service Scheme (NYSS) is to offer recognized skills training and career path; to facilitate the youth's contribution to socio-economic development; poverty alleviation, and creating opportunities for the youth. The Youth development service institution was established by the National Youth Service Act No. 6 of 2005.

144. The Government through the National Youth Service scheme also recruits the youth from the San, Ovatua and the Ovatjimba communities, as a way of contributing to the development of the San community aimed at capacitating them for future gainful employment opportunities. They are encouraged to provide their names annually, so that a significant San intake can be achieved over a period of time. Currently the Office of the Deputy Prime Minister is facilitating the submission of names and through the offices of regional governors.

### 7. Employment

145. The Government through the Office of the Prime Minister encourages Offices/Ministries/Agencies (OMAs) to give preference to the employment of the marginalized communities. It is important to note that the current Special Advisor to the Deputy Prime Minister is from the San community. There are also four San persons employed and working in the Office of the Prime Minister.

146. Government is keen to co-opt the goodwill of the private sector to assist in sourcing employment for the San. The office of the Deputy Prime Minister has facilitated the employment of four San people at Tsumeb Auto Tech Panel after the completion of their training at Windhoek Vocational Training Centre and nine San people with Namibia Wildlife Resorts, a Government-owned enterprise. The office of the Deputy Prime Minister has made a written directive to all regional councils to make sure that they make it possible to employ San-speaking Namibians.

### 8. Donations

147. Government has engaged the following institutions to make donations to the San Development Programme:

- Standard Bank of Namibia financed the Okaepe School Project with an amount of N$ 70,000 (US$ 8,000), to provide donkey carts, hostel fees and mattresses, as well as the Donkerbos school, which will benefit from an amount of N$ 96,000 (US$ 11,294). In addition, Standard Bank of Namibia also committed itself to contribute annually N$ 100,000,00 (US$11,764) towards educational support.
- Other private sector companies and foreign agencies came on board to assist, namely: the Embassy of the People's Republic of China, Icelandic International Development Agency, Namdeb, Nedbank, Old Mutual, Rosh Pinah, Corporate Training Solutions, Red Cross, Omankete Investments (Pty) Ltd, Ark Fishing (Co).

### 9. Coffin manufacturing project

148. One of the projects which have been identified by the Office of the Prime Minister is the coffin manufacturing project for the San people. It has been the practice that the San people were being buried in plastic bags, as they cannot afford a coffin for their deceased loved ones. The Government resolved to find ways and means to at least give them a

dignified burial like all other Namibians. In this regard, the Government commissioned a company that provides training to San trainees with the idea that they start up small manufacturing projects to produce coffins for their communities. The project started in Otjozondjupa region and will be extended to other regions.

### 10. Conservancies

149. The Government has acquired six farms adjacent to the Etosha National Park and for the resettlement of the Hai//om San community. Three of these farms have been earmarked for conservancies and cultural tourism development. This aims to create jobs and other income opportunities, leading to social improvement, poverty reduction among the Hai//om community. The Mangetti Dunes Group Resettlement San Project is situated within Tsumkwe West which is registered as a Conservancy (N#a-Jaqna) with almost all community members registered as members of the Conservancy and involved in normal farming activities.

### 11. Other Projects

150. The Office of the Deputy Prime Minister is currently working with other ministries and stakeholders on various projects including:

(a) The Resettlement programme;

(b) Aquaculture for San communities;

(c) Community garden projects self-sustainability;

(d) Social housing scheme for San communities;

(e) Hostel for Huigub School (Excelsior)-Oshikoto Region.

## Article 3

### 12. Measures taken to prevent, prohibit and eradicate racial segregation

151. Namibia does not have territorial jurisdiction on any other territory beyond its borders. In this regard, the Namibian Constitution and other laws apply to the whole country. Namibia is divided into 13 regions for administrative purposes, but the country is effectively controlled by the central Government. The country has one legal system, and the Namibian Police enforce the laws across the country.

152. Soon after independence in 1990, all schools in Namibia were desegregated in line with the Namibian Constitution and the Education Act, Act No. 16 of 2001. The segregation of schools on the basis of race is prohibited. As such, all Government and private schools are now open to all persons regardless of race, colour, religion or ethnic background.

## Article 4

### 13. Information on the legislative, judicial, administrative or other measures which give effect to the provisions of article 4

153. Namibia is a party to various international human rights treaties, ovenants, Conventions and Protocols, and is therefore obliged to conform to their objectives and obligations in terms of article 144 of the Namibian Constitution. The Namibian Constitution, especially Chapter 3, which contains the bill of fundamental rights, has been

widely praised for its protection of the human rights and freedoms embodied in most of the international human rights instruments.

154. Article 10 of the Namibian Constitution affirms the equality of all persons and freedom from discrimination, which provides that:

(i) All persons shall be equal before the law;

(ii) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

155. The Namibian Constitution does not explicitly provide for the protection of group rights.

156. However, article 10 of the Namibian Constitution may broadly be interpreted to guarantee such rights under its provisions that "all persons shall be equal before the law. No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status". The persons protected by the provision may all be said to belong to a certain group, whether a natural or one formed by choice.

157. After independence, the Government adopted a policy of national reconciliation whereby people were expected to forgive one another for the wrongs committed in the past and forge ahead in a conciliatory tone and nation building. Parliament enacted the following legislation to give effect to the Convention; namely:

(i) Racial Discrimination Prohibition Act No. 26 of 1991 as amended in 1998;

(ii) Agricultural (Commercial) Land Reform Act No. 6 of 1995;

(iii) Affirmative Action (Employment) Act No. 29 of 1998;

(iv) The Education Act No. 16 of 2001;

(v) Children Status Act No. 16 of 2006;

(vi) Communal Land Reform Act No. 5 of 2002;

(vii) Cultural Institutions Act No. 29 of 1969; and

(viii) National Art Gallery of Namibia Act No. 14 of 2000.

158. In terms of the Racial Discrimination Prohibition Act No. 26 of 1998, Section 11 explicitly states that "no person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:

(i) Threaten or insult any person or group of persons on the grounds that such person belongs to a particular racial group; or

(ii) Cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(iii) Disseminate ideas based on racial superiority.

159. It is clear from this Act that this is an offence criminally punishable in our law.

160. With regard to the prohibition of public authorities or public institutions, national or local, from promoting or inciting racial discrimination, Section 1 of the Racial Discrimination Prohibition Act prohibits this. It states that:

- No person shall
  - Deny any other person access to or the use of any public amenity or any facility in a public amenity;

- Permit any other person such access or use on less favourable terms or conditions than those upon which he or she would otherwise permit such access or use; or

- Require any other person to leave or cease to use any such amenity or facility, because such other person is a member of a particular racial group;

• No person shall in respect of any public amenity apply any practice or policy whereby any facility or service available at such public amenity is provided to members of the public on a segregated basis according to colour, race, nationality or ethnic or national origin.

161. As to the position of the courts whether racial motives are considered as an aggravating circumstance under domestic penal legislation, it would be instructive to look at the cases that came before the courts, in which the courts were expected to interpret the application of the constitutional provisions on the relationship between free speech and the prohibition on racial discrimination.

162. The leading case in Namibia relating to this position is *S v. Van Wyk* 1993 NR 426 (SC), in which the Supreme Court ruled that racial motives can be considered as an aggravating circumstance in criminal matters/cases. This appeal is of fundamental importance to the people of the Republic of Namibia, insofar as it deals with the problem of violence motivated by racism.

163. It was an appeal case from the High Court to the Supreme Court. The facts which gave rise to the case are set out in great and searching detail by Ackermann AJA, who wrote the judgement of the Court:

> "The appellant, a young white man, who was 21 years of age, together with four other young white men, happened to be in a street in Windhoek in the early hours of the evening of 27 October 1990. There they accidentally met a black man, Johannes Haufiku (the deceased). The deceased, was peacefully walking in the street, when he came across the appellant and the other young white men. The deceased was then brutally and viciously assaulted. The evidence proved beyond reasonable doubt that the assault was perpetrated by the appellant. The deceased was struck a number of blows, and fell against a concrete wall. He tried to defend himself, without any success, but managed to get up, when the assault continued in a most brutal fashion, so that he again fell, this time to the concrete sidewalk. By this time he was described as having been reduced to pulp. The assault nevertheless continued, by being kicked severely a number of times, resulting in him being just a bundle of flesh."

Ackermann AJA stated in the main judgement that "it was a brutal and cowardly attack on an unarmed and defenceless victim. He was treated generally as an inhuman being". "It was also clear that this assault was racially motivated". "It is in the highest degree unlikely that the attack would have taken place on a person if he had been white".

164. To continue the events of the evening: the deceased, after the assault (when he was still alive) was then picked up by two of the men and dragged into a motor car nearby, where he was put on the back seat of the car. The five men then climbed into the car, and the car then drove off with its lights switched off.

165. The deceased's body was found at approximately 08:00 the following morning, where he was dumped on a rubbish heap at Avis. He was dead.

166. This, then, is the background to this gruesome affair. The appellant was thereafter tried on a charge of murder by Frank J, in the High Court. He was found guilty of murder and sentenced to 12 years' imprisonment.

167. Becker CJ stated in the appeal that there are some aspects emanating from this which should, in his view, be brought to the attention of the people of Namibia and the press:

> "First of all there can be no doubt that the assault was racially motivated. Very regrettable incidents of this nature have occurred and still occur in our country on quite a number of occasions, where white men attack and assault black citizens, being motivated by racism. The rate of this type of crime must be brought under control, and this Court will act firmly and very severely with such cases, imposing heavy and long sentences of imprisonment. Assaults of a non-racial nature, mainly with the motive of enrichment, will of course also be very severely dealt with as serious crimes. Regrettably this concerns members of our black population."

168. One of the many defences put up by the defence was that racism was a personality trait or characteristic. This was the view given in evidence by a psychologist called by the defence, the gist of which was that "an accused who commits a racially motivated crime is entitled, from a psychological perspective, to be dealt with more sympathetically if his racism is environmentally induced".

169. In short, the proposition was strongly advanced by the defence that because appellant had grown up in a racist environment, which formed his whole personality and approach, this should be treated as a mitigating factor. This was, as already stated, the view of the psychologist, whose view was strongly advanced by counsel for the defence. Becker CJ vehemently disagreed with this approach. In his view, and that of the High Court Judge, it is on the contrary a strong aggravating factor when passing an appropriate sentence.

170. The Namibian Constitution in several articles (arts. 6, 19(2), 23(1); 23(2), 131) makes it abundantly clear "how deep and irrevocable constitutional commitment is to, inter alia, equality before the law and non-discrimination and to the proscription and eradication of the practice of racial discrimination and apartheid and its consequences". These objectives may rightly be said to be fundamental aspects of Namibian public policy.

171. The situation in our country has been well summarized in the following:

172. This is a text from the judgement.

> "Article 23(1) in fact authorizes Parliament, when enacting legislation to render punishable practices of racial discrimination and apartheid, to prescribe such punishment 'as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practice' ".

173. It seems to me therefore that a court of law, when considering an appropriate punishment for a crime which has been motivated by racism, will in fact be acting in accordance with the constitutional commitment and public policy mentioned above referred to if it considers such racist motive to be an aggravating circumstance and therefore places additional emphasis on the retributive and deterrent objects of punishment in order, inter alia, to contribute to the eradication of racism.

174. Reference has been made to the above in order to make one thing quite clear, and that is that Namibian Courts will act in the letter and the spirit of the Constitution, as set out above. In doing so, it will deal extremely severely with persons in the country who act contrary to the Constitution and public policy.

175. Any person who will offend against this will be extremely severely punished. And it is this approach by this Court which should be brought to the attention of all citizens of our country, so that hopefully racially motivated crimes and offences will be stopped.

176. Mahomed AJA also commented on the same case, saying that: "I have had the privilege of reading the judgement of my Brother Ackermann and I am wholly in agreement with the conclusions to which he has arrived and the reasons which he has given for these conclusions. I wish, however, to make a few additional observations on the issue of sentence".

177. In his full argument on behalf of the appellant, Mr. Botes repeatedly contended that because the appellant was "socialized" or conditioned by a racist environment for many years, the fact that the murder of the deceased was racially motivated should in the circumstances be treated as a mitigating factor and not as an aggravating factor. He accordingly contended that the Court a quo had erred in "finding that the racial undertone must be seen as an aggravating factor".

178. This submission raises an important issue pertaining to sentencing policy in post-independence Namibia. Crucial to the identification of that policy is the spirit and the tenor of the Namibian Constitution. As I have previously said, the Constitution of a nation is not simply a statute which mechanically defines the structures of Government and the relations between the Government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its Government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

179. In *S v. Hotel Onduri* (Pty) Ltd And Another 1993 NR 78 (HC), the Court had to look into the issue of racial motives. It had been alleged that one U, a black man, and his black driver had arrived at a hotel owned by the second appellant. He informed them that they were not welcome, refused to allow them to dine at the hotel and objected to the fact that they had used the toilet without permission. The Court pointed out that in order to sustain a conviction on the alternative count, the State was required to prove that the accused reserved or restricted that part of the hotel which was a public amenity or where a service or facility for guests, visitors or clients was supplied, for the use of a particular race group, or, to indicate or to intimate that it was so reserved. The Court pointed out further that hotel liquor licenses were granted to enable the holder of such a license to provide an amenity to members of the public and to serve the public. The essential requirement of a hotel was service to the public.

180. Held, further, that it was not unusual in a sophisticated society that travellers, as indeed U and his driver were, visit the cloakroom to wash their hands and/or use the toilet before sitting down to a meal; there was certainly no obligation requiring a traveller to eat first before using those facilities and insofar as the defence attempted to rely upon a right to refuse a member of the public the use of such facilities, such attempt was spurious. Held, further, that it was clear from the evidence that appellants relied on a sign which read "right of admission reserved" for refusing to allow U and his driver to use the facilities.

181. Held that the sign did not specifically indicate that right of admission was reserved on racial grounds but the magistrate had found that this could be inferred from certain facts. Held, further, that it was clear from the evidence and background factors that accused No. 2 and therefore accused No. 1 on previous occasions were motivated by racialism; against this background there was the evidence that when U asked accused No. 2 why he was unwelcome, accused No. 2 took him outside to show him a notice which said that the right of admission was reserved.

182. The court held that all these factors must be considered collectively; according to the provisions of s 3(a) of Abolition of Racial Discrimination Act 3 of 1979, a person was guilty of the offence if he "in any manner indicates or intimates" that certain public amenities are reserved or restricted for a certain racial group.

183. As can be inferred from the above mentioned cases and the applicable sections of the Racial Discrimination Prohibition Act, Namibia is implementing these provisions to the best of its ability, and is also currently busy with necessary amendments to the Act.

## Article 5

### 14. The right to equal treatment before tribunals and all other organs administering justice

184. The cost of litigation, especially in civil suits is relatively high. In order to have successful civil suits, one has to have a private legal practitioner, which is an expensive exercise. In criminal cases, the complainant is represented by a public prosecutor who is paid by the State, and the accused is always represented by a private legal practitioner of his or her choice. If the accused person cannot afford a private legal practitioner of their own choice, he or she may apply to the State to be granted legal aid in terms of article 95 of the Namibian Constitution and the Legal Aid Act No. 29 of 1990, as amended.

185. Article 12 of the Namibian Constitution contains the provisions for fair trial. Article 12(1)(d) provides that all persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. In criminal proceedings, interpreters are provided to ensure that persons who are party to the proceedings, be they accused persons or witnesses, are able to participate and follow the proceedings.

186. The independence of the judiciary in Namibia is respected and all persons generally have an equal opportunity in court for a fair trial.

187. Article 18 of the Namibian Constitution provides that:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal".

188. This article directly protects the right of every individual to equal treatment before a tribunal and all other organs administering justice.

### 15. The right of security of persons and protection by the State against violence and bodily harm

189. Personal liberty is guaranteed by article 7 of the Namibian Constitution, read together with article 11 which prohibits arbitrary arrest or detention. There are no political prisoners or detainees in Namibia, and the Government and its agents generally observe and respect this prohibition.

190. Article 8 of the Namibian Constitution guarantees respect for human dignity and proscribe the subjugation of any one to torture. Article 7 provides that no person shall be deprived of personal liberty, except according to procedures established by law. Namibia is a party since 1994 to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although some State authorities have been reported to have committed acts of torture against suspects, especially in relation to the Caprivi High Treason trial, the Government's position is that it does not condone torture. Charges and civil suits have been laid and other cases are pending against those involved. The leading case on the prohibition of torture is *Namundjebo and Others v. Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR671 (NMS).

191. In *Namundjebo and Others v. Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR671 (NMS): a prison warder put Thomas Namundjebo and four other trial-awaiting prisoners in chains (or "leg irons"). The chains consisted of two metal rings with a fastener that is usually wedged closed or sealed in such a way that the prisoner cannot remove the ring. A metal chain connects the two rings. The chains restrict the person's movement and are uncomfortable.

192. The prisoners were chained because one of them was allegedly planning to escape from prison and the others had previously escaped from prison. They remained in chains for approximately six months. The chains were only removed after the accused applied to the High Court. The applicants argued that being thus chained was contrary to article 8 of the Constitution.

193. The High Court decided in favour of the Commanding Officer, Windhoek Prison and the Minister of Prisons and Correctional Services. Namundjebo and others then appealed to the Supreme Court.

194. The Supreme Court noted that imprisonment necessarily affected some of the prisoner's rights, including the right to dignity. This did not, however, mean that a prisoner did not have the right to dignity.

195. To chain a person, "was a humiliating experience which reduces the person placed in irons to the level of a hobbled animal whose mobility is limited". It was also a strong reminder of the time when Africans were sold into slavery in chains.

196. The court therefore decided that it was at least degrading treatment to put chains on prisoners and was therefore contrary to article 8(2) and (b) of the Constitution. The effect of this ruling was that prison authorities could not in future hold prisoners in chains.

## 16. Political rights

197. Article 17 of the Namibian Constitution provides that all citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. "All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through their freely chosen representatives".

198. Namibia has a multi-party system of Government and conducts regular elections in order to guarantee governmental accountability and promote democracy. All citizens have the right to participate freely in all Government structures directly or through their freely elected representatives at the national, regional and local Government levels. Elections are conducted in terms of the Namibian Constitution and the Electoral Act, Act No. 24 of 1992, as amended. Every citizen over the age of 18 (eighteen) years has the right to vote. Every citizen above the age of 21 (twenty-one) years has the right to stand for public office, and those at the age of 35 and above may stand as candidates for President.

199. Since independence in 1990, Namibia conducted national and presidential elections in 1994, 1999, 2004 and 2009. It also conducted regional council elections in 1992, 1998, 2004, 2009 and local authority elections during the same period. The electoral laws is currently under review in Parliament.

200. Article 3(1) of the Namibian Constitution states that Namibia's official language shall be English. However, article 3(2) of the Namibian Constitution permits the use of other languages. In Namibia, people who do not speak the official language are not denied the use of their mother tongue in administration, justice, education and public service.

201. In addition to the prohibition of discriminatory practices, the Namibian Constitution explicitly permits measures undertaken to promote the advancement of persons disadvantaged by past discriminatory practices. The Affirmative Action (Employment) Act is a serious attempt to bring about equality of opportunity in employment, improving conditions of the previously disadvantaged, and eliminating discrimination.

202. The enactment of the Affirmative Action (Employment) Act No. 29 of 1998 which was promulgated in terms of article 23(2) of the Namibian Constitution is the actual realization of the principle of equal opportunity for promotion of the previously disadvantaged groups into employment and decision making positions. The legislation gives preference to women, people with disabilities and racially disadvantaged persons.

203. In terms of the Act, employers are obliged to submit to the Employment Equity Commission plans and reports outlining how they intend to achieve a fair and balanced workforce, and how to implement equal opportunity for promotion, training and recruitment for women, people with disabilities and racially disadvantaged persons. The Employment Equity Commission is composed of representatives from all these three groups.

204. The Act further requires that all employers put measures in place and implement them in order to remove all employment barriers such as bias in recruitment, interviewing and testing procedures. In addition, the Act requires employers to implement positive measures such as special training courses and implement reasonable job accommodation measures to advance in employment targeting blacks, women and people with disabilities for affirmative action.

205. The Employment Equity Commission (EEC) commissioned an Action Impact Assessment Study in June 2004, to review the progress made towards equity in employment. Special attention was paid to changes in workforce profiles with regard to the representation of people from designated groups. The Study also examined the measures taken by relevant employers; the extent of consultations that took place at the various workplaces; the services rendered by the EEC; as well as the achievements and shortcomings of the affirmative action policy thus far.

206. The Report's findings generally confirmed the slow progress regarding the affirmation of persons in designated groups at most management and supervisory occupational levels across most industrial sectors. White males are still the dominant group at senior management level, although their share of middle management posts declined to below 40%. More significant changes occurred in the specialized/skilled/supervisory job category, where black males increased their share to over 40%. Black women also increased their share in this category but are still substantially under-represented. The job categories covering skilled, semi-skilled and unskilled workers are dominated by black males who increased their proportionate share during the period covered. People with disabilities were hardly employed by relevant employers and very few organizations took concrete steps to accommodate them.

207. In addition, the central Government encourages all government institutions to apply affirmative action principles in terms of the law to accommodate employment opportunities for indigenous people, the San in this regard.

208. A wide range of Ministries especially the Ministry of Defence and the Ministry of Safety and Security have relaxed the requirements for employment when employing San and Himba people in their Forces.

# V. Other civil rights

## 17. The right to freedom of movement and residence within the borders of the State

209. Article 21(1)(h) guarantees citizens the right to freely move throughout Namibia and to settle in any part of Namibia. There are no reports of anyone who has been refused entrance to any part of the country or evicted on the grounds of ethnic origin, language or colour.

## 18. The right to leave and return to one's country

210. Article 21 (1) guarantees the right to leave and return to Namibia. Namibians are free to leave and return to their country, provided they possess the required travel documents. No one is subject to any system of arbitrary administrative controls on his/her movement from and into the country.

## 19. The right to a nationality

211. Article 4 of the Constitution regulates the acquisition and loss of citizenship. Article 4(9) of the Constitution empowers Parliament to enact legislation to further regulate the acquisition or loss of Namibian citizenship. In this regard, Parliament enacted the Namibia Citizenship Act No. 14 of 1990.

212. In the case of *Ihloro v. Minister of Home Affairs* 2008 (1)(NR) 97 (HC), the court held that there is an automatic acquisition of citizenship for those born in Namibia, and that they cannot be deprived of that, even if they have acquired citizenship of another country. This was confirmed in a recent case of *Iris Regina Le Roux v. Minister of Home Affairs and Immigration and Others* 2011 (2) NR 606 (HC). In this case, the court held that Namibian citizens are entitled to obtain citizenship of another sovereign country without the need to renounce their Namibian citizenship by birth. These cases confirm that Namibians born in the country may be able to legally hold dual citizenship.

## 20. The right to marriage and choice of spouse

213. Article 14 of the Namibian Constitution provides that marriage shall be entered into only with the free and full consent of the intending spouses between a man and woman of full age without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status.

214. Civil marriages in Namibia are regulated by the Marriage Act (Act No. 25 of 1961) and the Married Persons Equality Act (Act No. 1 of 1996). Both men and women of 18 years and older, have the right and are allowed by law to marry and found a family. The most important aspect of the Act No. 1 of 1996 abolishes the common law rule, of the husband's marital power over his wife.

215. The effect of the abolition of husband's marital power is that a married woman has become fully emancipated, has the right to enter into contractual agreements, own property, act as a director and bind herself as surety without the consent of her husband. Refer to *Myburgh v. Commercial Bank of Namibia* 2000 NR 255 (SC).

216. Customary laws do not set a minimum age for marriage, but marriage generally does not take place before puberty, or before the attainment of an acceptable level of social maturity. Family consent is generally required for a marriage to take place. In most communities the consent of both the intended spouses is generally necessary, as well. A customary law marriage involves a series of negotiations between two groups and creates rights and responsibilities between all family members. A draft Bill on Customary marriages is still in consultation stages with different stakeholders. Although there are no

legal restrictions on Namibians to marry foreigners, there has been a concern in the country about possible abuses by foreigners who marry Namibians for the convenience of getting a foothold to permanently reside in Namibia or acquire citizenship.

### 21. The right to own property

217. The right to own property is constitutionally protected in article 16 of the Namibian Constitution. This article protects the right of persons as individuals or in groups to acquire, maintain and donate property, such as land, houses and personal effects like clothing and cars, among other things. Article 16 further protects individuals from being deprived of their property without compensation.

218. However, ownership of fixed property is subject to the possibility of expropriation by the Government only if it is entitled to do so by a law which applies to everyone. The expropriation would preferably be permitted for public purposes rather than in the public interest. The government's expropriation and resettlement has equally sought to benefit previously racially disadvantaged persons.

### 22. The right to inherit

219. Article 66 of the Namibian Constitution recognizes both customary and common law, provided that the common law and customary law are not in conflict with any provisions of the Constitution. The black majority of the population follows the customary and traditional practices when it comes to inheritance. The common law position of illegitimate children that they cannot inherit intestate from their fathers has been resolved by the enactment of the Children's Status Act, Act No. 6 of 2006. Section 16(2) of the Act provides that:

> "Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance either intestate or by testamentary disposition, is treated in the same manner as a person born inside marriage".

220. The matter of illegitimate children was also before court, and the court held that the common law rule is unconstitutional. In the case of *Frans v Paschke and Others* 2007 (2) NR 520 (HC), the plaintiff did not inherit when his father died because of the common law rule that an illegitimate child cannot inherit intestate from his father.

221. The plaintiff claimed that the deceased was his father who did not marry his mother. Instead, the entire estate of his deceased father was awarded to the first Defendant who was his sister. The plaintiff instituted an enrichment claim against first Defendant (sister), alternatively a claim for an award under article 25 of the Constitution. The parties agreed that the issue as to the constitutionality of the common law rule should be heard as a separate issue. Damaseb JP stated that

> "the differentiation indeed amounts to discrimination against illegitimate children. By design or result, the social stigma which attached to adulterous and incestuous children was transferred to children born out of wedlock. This appears to be the case simply because the maxim 'een wyft maakt geen bastaard' had been echoed from generation to generation, apparently without much legal philosophical reflection; having come to the conclusion, I hold that the common law rule did indeed become invalid, and unconstitutional on 21 March 1990".

222. The Communal Land Reform Act, Act No. 5 of 2002, has also resolved the issue of land rights to women who are married under customary law. Section 26(2) of the Act provides that:

"Upon the death of the holder of a right referred to in subSection (1) such right reverts to the Chief or Traditional Authority for re-allocation forthwith:

(a) To the surviving spouse of the deceased person, if such spouse consents to such allocation; or

(b) In the absence of a surviving spouse, or should he or she not consent as contemplated in paragraph (a), to such child of the deceased person as the Chief or Traditional Authority determines to be entitled to the allocation of the right in accordance with customary law."

223. Based on this provision and the Namibian Constitution, our courts empowered many women who had been deprived of their property and which family members of the deceased invariably grabbed from the surviving spouse. Although some customs and traditions of different communities still discriminate against women, there are a number of female traditional leaders in Namibia, which is a good sign for gender balance, as it encourages women to participate in social and domestic issues that affect them on a daily basis.

## 23. The right to freedom of thought, conscience and religion

224. Article 21(1) (b) of the Namibian Constitution states that "all persons shall have the right to freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning".

225. Academic freedom and education are concepts that are increasingly interlinked and finding wider significance. In Namibia, academic freedom is afforded the status of a fundamental freedom by the Namibian Constitution in terms of article 21(1) (b).

226. However, the scope of application of the enjoyment of academic freedom in Namibia has not yet been the subject of any litigation before Namibian courts. If a petition were to reach the Namibian courts, it would provide an opportunity for authoritative interpretation to be obtained on academic freedom. Essentially, the concept of academic freedom from the point of view of an academic institution holds that any of its faculties should be free to teach, devoid of any influence from management, government, donors, or other third parties.

## 24. Freedom of opinion and expression

227. The right of freedom of opinion and expression in the Covenant is protected by article 21(1) (a) and (b) of the Namibian Constitution. The Namibian Supreme Court in the leading case of *Kauesa v. Minister of Home Affairs and Others* 1995 NR 175 (SC) discussed and determined the extent of any limitations on the exercise of this right.

228. Briefly stated, in this case Mr. Kauesa was a warrant officer in the Namibian Police. He appeared on an NBC television panel discussion on the topic of affirmative action in the context of the restructuring of the Namibian Police and the Public Service. The Namibian Police started disciplinary actions against Mr. Kauesa because of his remarks during the panel discussion. He was charged with contravening a Namibian Police regulation which prohibited members of the Namibian Police from commenting unfavourably in public on the administration of the Namibian police or any other government department.

229. Mr. Kauesa applied to the High Court to stop the disciplinary enquiry. He argued that the regulation was contrary to the right of freedom of speech and expression (Art. 21(1) (a) of the Constitution.). The Supreme Court held that freedom of opinion and expression was fundamental to ensure the appropriate development of democracy:

> "In the context of Namibia, freedom of speech is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic State the citizens must be free to speak, criticize and praise where praise is due. Muted silence is not an ingredient of democracy, because the exchange of ideas is essential to the development of democracy".

### 25. Freedom of peaceful assembly and association

230. Article 21(1) (d) and (e) guarantee freedom of peaceful assembly and association respectively. In view of Namibia's recent history and experience of armed resistance against the colonial administration, it was necessary to specifically provide that henceforth any freedom to assemble and associate must be peaceful and without the use of arms as a means of demonstrating opposition to a certain policy or the actions of Government or any other actor. Resistance or disapproval of Government policy must be done peacefully. Thus, it would not be permitted for any political association to exist where its aim is to effect change through the use of force, violence or violent insurrection.

231. The Public Gatherings Proclamation, AG 23 of 1989 requires advance notice to the police for all public gatherings and prohibits the carrying of weapons. The provisions of the Proclamation are also applicable to election campaigning, religious gatherings, celebrations and other demonstrations. It also gives the police powers to place conditions on gatherings and to disperse riots. The police have no powers to unreasonably refuse the permission.

### 26. Economic, social and cultural rights

232. The enjoyment of economic, social and cultural rights has been guaranteed by the Namibian Constitution in terms of a number of its relevant articles, notably, article 95 as principles of State policy, read with article 8 (respect for human dignity), article 10 (equality and freedom from discrimination), article 19 (protection of the right to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion etc.).

233. Article 95(b) commits the Namibian State to promote the welfare of the people, by adopting policies aimed at:

> "... (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;
>
> (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
>
> (d) membership of the International Labour Organization (ILO), and where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO."

234. In this regard, the Labour Act No. 11 of 2007 regulates the entire labour force market to guarantee employees free choice of employment, just and favourable conditions of work, equal pay for equal work and just and favourable remuneration. A number of cases have been litigated through the district and labour courts which established important precedents for the regulation of the labour market. It is beyond the scope of this report to discuss many of these cases. Suffice it to say that notable decisions have been made over the years which have spurred the progressive development of labour relations in the country.

235. Article 95(c) of the Constitution commits the State to encourage the formation of independent trade unions to protect workers' rights and interests and to promote sound labour relations and fair employment practices. The right to form trade unions is also guaranteed as a non-derogable fundamental freedom in article 21(e) of the Constitution. The Labour Act 11 of 2007 regulates the procedure for the registration and recognition of trade unions. Since independence, some 47 trade unions have been registered with the Labour Commissioner.

236. Namibia is party to ILO Conventions No. 87 of 1948 on Freedom of Association and Protection of the Right to Organize and No. 98 of 1949 on the Right to Organize and Collective Bargaining.

237. Namibia is not a party to ILO Convention No. 151 of 1978 on Labour Relations.

### 27. The right to work

238. Namibian citizens have the right to work and the Government has taken multiple actions and policies to prevent racial discrimination in the enjoyment of the right to work. The Labour Act of 2007 confirms the Namibian constitutional prohibition of discrimination in employment on the grounds of sex, race, colour, ethnic origin, region, creed or social or economic status.

239. The Act furthermore prohibits discrimination in employment on the grounds of HIV/AIDS and marital status, family responsibilities, political opinion and previous, current or future pregnancies. See Nanditume vs NDF case annexed hereto. In *Nanditume v. Minister of Defence* 2000 NR 103 (LC), the Labour Court held that the exclusion of the applicant from the Defence Force on the ground that he had tested HIV positive constituted unfair discrimination.

### 28. Affirmative action

240. The Government has enacted the Affirmative Action (Employment) Act, 1998 with the specific purpose of redressing discrimination and to advance the disadvantaged in employment in the public and private sectors. Affirmative action programmes are carried out through affirmative action plans which employers (including Government Offices/Agencies) are required to submit to the Employment Equity Commission for approval.

241. The Employment Equity Commission is composed of representatives of employers, employees and members of designated groups. The mandate of the Commission is to monitor compliance with the law and to investigate complaints of discrimination in employment practices. Upon approval, employers have to implement plans which set out how they will advance previously disadvantaged groups in the hierarchy of their respective organizations.

242. Affirmative action reports are required to be submitted in order to assess compliance with the plans agreed with the Commission. Various penalties are prescribed for non-compliance, including prosecutions and denial of work permits and Government procurement tenders.

### 29. Other affirmative action measures

243. Apart from the Affirmative Action (Employment) Act 1998, affirmative action provisions have been included in diverse pieces of legislation which have been adopted since independence, in which provision is made for advancing previously disadvantaged persons and females. These include the Agricultural (Commercial) Land Reform Act 1995 and the Married Persons Equality Act of 1996.

244. In addition to legislation, Ministries have also adopted policy directives which purport to apply corrective measures to redress social, economic or educational imbalances in Namibian society as contemplated in article 23(2) of the Constitution. This explains the policies implemented to give effect to the balanced structuring of the public services, the police force, the defence forces and the prison service, which were effected without formal enactment of enabling legislation for the application of affirmative action in the restructuring of Government prior to the enactment of the Affirmative Action (Employment) Act, 1998.

### 30. The right to form and join trade unions

245. Namibia is a party to the ILO Conventions No. 87 of 1948 (on Freedom of Association and Protection of the Right to Organize) and No. 98 of 1949 (on Right to Organize and Collective Bargaining). The right to form trade unions is constitutionally guaranteed as a non-derogable fundamental right in article 21(e) of the Constitution. There is therefore no restriction on non-citizens to form or join trade unions, as this right is a recognized right under Namibian national law.

246. Sections 53 and 54 of the Labour Act of 2007 make provision and set requirements for the establishment of trade unions in Namibia, except for members of the Namibian Defence and Police Forces, who may not belong to or form trade unions. The Labour Act 11 of 2007 regulates the procedure for the registration and recognition of trade unions. The provisions have been practically applied in Namibia, and as a result, a total of 47 trade unions and 3 federations have been registered with the Labour Commissioner since 1992. Trade unions represent approximately 450,000 employees in both the public and private sectors. Members of the administration of the state have equal rights to form and belong to trade unions of their choice. They can also strike like any other employees in the country.

247. The Labour Act has put in place measures to promote free collective bargaining principles and processes at the enterprise, industrial and national levels. Many trade unions have concluded and entered into Procedural and Recognition Agreements with different employers on labour and employment issues.

### 31. The right to housing

248. Namibia at independence identified housing as one of the priority areas of development. Based on that notion a National Housing Policy was formulated and approved by the Cabinet in July 1991.

249. The objectives of the Government policy was to create the necessary conditions for every Namibian irrespective of race, colour, creed or social status to achieve housing provision according to their needs, priorities and affordability, and to promote partnership between public and private sector in order to ensure efficient, effective, adequate, affordable housing provision for all Namibian citizens.

250. This right is derived from the right to an adequate standard of living as contained in the International Covenant on Economic, Social and Cultural Rights. In July 1991, the Government adopted the National Housing Policy in which it recognized the right to shelter and a place to live as a fundamental right. This policy guided the formulation of the National Shelter Strategy and implementation of the National Housing Programme.

251. The Government recognizes shelter as a fundamental right. Therefore, through the National Housing Policy, it has developed a National Strategy to facilitate the provision of housing to the population by providing access to finance to low-income people to acquire housing. The Ministry of Regional and Local Government, Housing and Rural Development, the Local Authorities, the National Housing Enterprise (NHE), and the private sector are the co-drivers of this national strategy.

252. The Government has established a Habitat Research and Development Centre to research and promote the use of local building materials. The Government also acquired a patent right of an EASY BUILD MOULD. The Mould is designed with a simple technology to be used by everyone with little expertise and guidance during construction. The structure is being plastered at the same time of construction. This will eliminate the costs relating to the use of qualified bricklayers and other related costs. The construction of houses with clay has been introduced by private consultants and is supported by Government.

253. A National Habitat Committee was set up and is assisted by Regional Habitat Committees in all the 13 regions which consider human settlement development issues and oversee the implementation of the Decentralized Build Together Programme (DBTP).

254. The DBTP oversees the implementation of four sub-programmes namely:

(a) Urban/rural sub programme;

(b) Social housing sub-programme;

(c) Single quarters transformation;

(d) Informal settlements upgrading.

255. The Government has also sub-programmes on housing, and the objectives of these sub-programmes are to:

(a) Facilitate housing loans to low-income families;

(b) Assist low and middle-income families who are living in unproclaimed areas and those who do not have access to credit from banks, building societies and housing delivered by the National Housing Enterprise (NHE); and

(c) Facilitate housing loans to low-income family groups living in disadvantaged circumstances.

### 32. The right to public health and social services and social security

256. The Health services of Namibia are run by the Ministry of Health and Social Services. At independence, the country inherited a fragmented health system based on racial segregation and marked by a concentration of infrastructure and services in urban areas. Parliament passed the Hospitals and Health Facilities Act No. 36 of 1994 to consolidate the laws relating to State and private hospital health facilities, which are broadly defined to include clinics, pharmacies and laboratories. The Ministry of Health and Social Services has received a relatively high share of funds from the national budget since independence. The financial resources allocated to the Ministry have contributed to a number of health sector reforms in order to expand the availability of health facilities in rural areas, which has taken place in the area of primary health care, and a significant increase in the coverage of various services as well as the general improvement of health services in the country.

257. The Government of Namibia has a National Health Policy. The primary health care approach of the World Health Organization has been adopted as part of Namibia's health policy. The system inherited at independence has been reoriented and the health districts have been strengthened. A Comprehensive Primary Health Care Programme has been implemented since independence in all health districts in the country.

258. The main objective of the Government in the delivery of health services is to improve the health of the Namibian population through the provision of relevant preventative, curative and rehabilitative services, which are affordable to all Namibians.

259. There are State hospitals in virtually all major towns in the country. In smaller towns, villages and rural settlements, there are well-equipped and staffed clinics and healthcare centres which are operated by the Ministry of Health and Social Services. Windhoek, the capital city, has three private hospitals, and there are six more private hospitals in the major towns of Otjiwarongo, Tsumeb, Walvisbay, Swakopmund and Ongwediva.

260. The provision of health services in Namibia is shared among three main providers, with the Government accounting for 70-75%, missions or churches 15-20% and the private sector 5%.

261. The mission's health service providers are non-profit-oriented, are mostly operating in rural areas and are Lutheran, Roman Catholic and Anglican missions. These missions are 100% subsidized by the Ministry of Health and Social Services.

262. The private sector, which is profit-oriented, is mainly urban-based. They provide health care from 11 medium-sized private hospitals and from private pharmacies, doctors' surgeries and nursing homes.

263. At the community level, the Government works with NGOs, community-based organizations and local councils to promote community action spearheaded by a wide range of community health workers (community health volunteers, traditional birth attendants, and community own resource persons). A mobile outreach programme supports the initiative, backed by clinics and health centres.

264. The Ministry of Health and Social Services (MOHSS) has since adopted a decentralization strategy to improve service provision and management by dispersing authority to all 13 MOHSS regional management teams. A total of 34 health districts have been created to coordinate community health services, clinics, health centres and district hospitals. Four regional health directorates support the 34 health districts.

265. In an effort to further support the districts, a total of three hospitals, namely Oshakati, Rundu and Katutura, have been upgraded to be intermediate/referral hospitals, while the Windhoek Central Hospital performs the role of overall national referral hospital. The referral hierarchy is based on the principle of a cost-effective referral chain so that health-care provision is based on specific need rather than on factors such as historical forces or skewed incentives.

266. The key health challenges that the country faces include an HIV/AIDS epidemic, tuberculosis, malaria, emerging non-communicable diseases, maternal and child health and environmental health.

267. The health sector is guided by the Ministry's Overall Health Policy Framework, which was revised in 1998. The policy is based on the tenets of primary health care approach, which include equity, inter-sectoral collaboration and community participation. The main objective of the Government in the delivery of health services is to improve the health of the Namibian population through the provision of relevant preventative, curative and rehabilitative services, which are affordable to all Namibians.

### 33. Social security

268. Social security in Namibia is an integral part of the Government's efforts to promote the welfare of the people. Two pieces of legislation govern the social security scheme: the Workmen's Compensation Act No. 30 of 1941, as amended, and Social Security Act No. 34 of 1994.

269. The amendment of the Workmen's Compensation Act established the Accident Fund and Accident Pension Fund and provides the framework for insuring employees

against loss of earnings resulting from employment injuries and diseases contracted in the course of employment.

270. The Social Security Act provide for the establishment, constitution, powers, duties and functions of the Social Security Commission and for the payment of maternity, sick leave and death benefits. The Act requires that all the employers and employees should be registered with Social Security Commission and must contribute monthly to the Fund.

271. Since 1994, Namibia has had well-functioning social security coverage applicable to contributing workers. Following the enactment of the Social Security Act, the Social Security Commission (SSC) has successfully built capacity to run its Maternity Leave, Sick Leave and Death Benefit Funds (MSD Fund) and the Accident Fund (AF).

272. The MSD Fund prescribes five types of benefits viz. maternity, sickness, death, disability and retirement, while the Accident Fund provides for the payment of compensation and reasonable medical expenses in respect of work-related injuries or industrial diseases contracted by employees during the course of their employment.

### 34. The old age pension grant

273. Namibia is one of the few countries in Africa that pays out old age pension every month by the State. This is an important source of income for senior citizens and for poor households. In fact, some households depend on these pensions.

274. Before independence, pension levels were determined by ethnic criteria. The pension amount ranged from a high of N$ 382.00 (US$ 47.75) per month for whites to a low of N$ 55.00 (US$ 6.87) per month for blacks. The Government has addressed these imbalances by maintaining the highest pension while progressively increasing the lower amounts. However, all pension payments were subsequently equalized to N$ 370.00 (US$ 46.25), and it was raised to N$ 450.00 (US$ 56.25) per month during the 2008-2009 financial year. Again it was increased to N$ 500.00 (US$ 62.50) in the 2010-2011 financial year. In 2011-2012, it has been raised to N$ 550.00 (US$ 68.75) per month.

275. The Social Assistance Database of 2012/2013 shows that payment is being made to 266,521 beneficiaries (of whom 140,244 are elderly and 26,277 are people living with disabilities) under the ongoing Government programme. In addition, about 1,800 war veterans receive N$ 500.00 (US$ 62.50) per month. The Government also pays a funeral benefit in the amount of N$ 2,500-00 (US$ 312.50) in respect of each registered deceased pensioner.

276. The Government is in the process of reviewing the social security set up to ensure that all the necessary components of social welfare are catered for, and that the contributions and benefit structures (including the benefits secured through the Social Security Commission) are adequate to secure maximum benefits with minimum contribution.

### 35. The right to education and training

277. Article 20 of the Namibian Constitution provides that all persons in Namibia shall have the right to education. It further provides that primary education shall be compulsory and shall be provided free of charge at state schools. In 2001, Parliament passed the Education Act, Act No. 16 of 2001, to give effect to the Constitution and other international instruments.

278. Soon after independence in 1990, schools in Namibia were all desegregated in line with the Constitution and the Education Act, Act No. 16 of 2001. The segregation of schools belonging to different racial groups has all but disappeared. All Government and private schools are now open to all persons regardless of race, colour, religion or ethnic

background. The Ministry of Education established the Directorate of Adult and Continuing Education to cater for the educational needs of adults and out-of-school youth.

279. Educationally marginalized children are a diverse group, and their educational needs differ from community to community. This group comprises children of farm workers, San children, Ovahimba children, street children and children in squatter areas. For most of the groups, two common reasons suggested as affecting their education are poverty and/or attitudes shown by non-marginalized groups. In an effort to improve access to education for the marginalized children, the ministry, working together with non-governmental organizations (NGOs), has introduced programmes such as the Nyae-Nyae Village School programme where the curriculum is community-based and the San language is the medium of instruction.

280. A pilot mobile school project has started in the Kunene region and a School Feeding Programme has been implemented in poor rural schools to keep the children of very poor families in school. The provision of twelve mobile school units for Ovahimba children in Kunene Region on a pilot basis has materialized and the sponsorship of twenty San learners by the Royal-Overseas League (ROSL) of the United Kingdom has been secured. The purpose is to enable these San learners to pursue their primary and secondary education and possibly proceed to tertiary education.

281. The policy document on EMC entitled, "National Policy Options for Educationally Marginalized Children", was completed and endorsed by the EMC; five Nyae-Nyae Village School San teachers were granted the status of Grade 10 equivalence in 1998 and thus have been enrolled in the ISC programme. Through the Inter-sectoral Task Force, a strong voice representing the plight of the EMC has been created and its Secretariat is housed in the Directorate EPI. Primary schools are decentralized to be within walking distance of most children, even in rural areas. Primary education starts at 7 years of age and covers Grades 1 to 7. Semi-automatic promotion is practised. The Early Childhood Development Policy is already developed and implemented.

282. The National Policy on Orphans and Vulnerable Children (OVC) adopted by the Cabinet provides for the strengthening of the capacity of children and young people to meet their own needs. The National Policy for Educationally Marginalized Children (EMC) is comprehensive and clear in defining categories of educationally marginalized children, and defines the main reasons for marginalization in education.

283. The Education Act of 2001, the National Early Childhood Development Policy, and the School Health Policy are geared towards addressing school-related expenses, providing health care and nutritional support, ensuring a safe and non-discriminatory learning environment and ensuring equal opportunity for all children, especially vulnerable and marginalized children. The School Development Fund has been abolished at all Government schools as from January 2013.

### 36. The right to equal participation in cultural activities

284. Namibia is a country rich in culture and traditions. Article 19 of the Constitution of the Republic of Namibia provides that:

> "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or national interest."

285. The Government does not maintain records based on the ethnicity or race of its citizens. Cultural expression reflects the many different groups that coexist in the country. Cultural development is further promoted by institutions such as the National and Mobile

Museum, Museum Association of Namibia, National Theatre of Namibia, College of the Arts and the Arts department at the University of Namibia (UNAM). Many of these groups are invited and travel all over the world to participate in international cultural events and performances.

286. The Namibia Broadcasting Corporation (NBC), which is the only public broadcaster, has eight radio services and one television channel. It broadcasts in six languages from Windhoek and in all the indigenous languages from transmitters in their respective areas, including Khoisan language of the San people broadcasting from Tsumkwe.

### 37. The right of access to places of service

287. Section 2 of the Racial Discrimination Prohibition Act deals with the right of access to public amenities. It states that:

> "No person shall:
>
> (a) Deny any other person access to or the use of any public amenity or any facility in a public amenity;
>
> (b) Permit any other person such access or use on less favourable terms or conditions than those upon which he or she would otherwise permit such access or use; or
>
> (c) Require any other person to leave or cease to use any such amenity or facility, because such other person is a member of a particular racial group."

288. The Act further provides that no person shall in respect of any public amenity apply any practice or policy whereby any facility or service available at such public amenity is provided to members of the public on a segregated basis according to colour, race, nationality or ethnic or national origin. The Act defines "public amenity" to mean:

(a) Any public accommodation establishment, including any hotel, guest-house, pension, rest camp, guest farm, holiday farm, caravan park or any other premises in or upon which accommodation is normally available for and provided to members of the public;

(b) Any public recreation area, including any game park, nature reserve, tourist recreation area, holiday resort or any other similar area to which members of the public normally have access or may obtain admission either free of charge or against payment of a fee;

(c) Any public restaurant, including any refreshment room, tea room or other premises in or upon which food or drink (whether alcoholic or not) for consumption on the premises is normally provided to members of the public;

(d) Any public conveyance which members of the public are normally entitled or allowed to use for travelling, whether by air, rail, road or sea;

(e) Any theatre or other premises where a dramatic performance, play, concert or film is presented or shown to members of the public;

(f) Any premises where an exhibition, sports meeting or any function is held or any event takes place which members of the public have been invited or are normally allowed to attend.

289. The Act also imposes a penalty for contraventions of the principles laid down in it. Section 14 of the Act deals with offences and penalties, and provide as follows:

"Any person who contravenes any provision of Sections 2 to 12, both inclusive, shall, subject to sub-Section (2), be guilty of an offence and on conviction be liable:

(a) In the case of an offence in terms of any of those sections, excluding Section 11, to a fine not exceeding N$ 80,000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment; and

(b) In the case of an offence in terms of Section 11, to a fine not exceeding N$ 100,000 or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment."

## 38. Information by relevant groups of victims or potential victims of racial discrimination

### Refugees and Displaced Persons

290. Almost every year, Namibia experiences the internal displacement of persons during the rain, season because of floods. People are displaced for about 3 to 6 months before they are allowed to return to their permanent homes. The Office of the Prime Minister coordinates all the disaster management and humanitarian relief and assistance in the country.

291. Namibia ratified the Convention relating to the Status of Refugees of 1951 as well as the OAU Convention Governing the Specific Aspects of Refugees Problems in Africa of 1969. Parliament passed the Namibia Refugee (Recognition and Control) Act No. 2 of 1999 to give effect to these international instruments. The Namibian Government has made reservations to article 26 of the 1951 Convention.

292. In terms of Section 19 of the Namibia Refugees (Recognition and Control) Act, the Government reserves the right to designate a place or places for principal reception and residence for refugees or to restrict their freedom of movement in consideration of security. In practice, the Government provides protection to refugees against expulsion or return to countries where their lives or freedom would be threatened.

293. The Government allows the refugees to leave the refugee settlement Camp for up to 14 days or more, depending on the reasons given by whoever wishes to visit a specific place inside or outside the country. Their movements are regulated via the office of the Camp administrator situated within Osire Refugees Settlement. This is mainly done to safeguard their well-being and protection while they are away from the settlement.

294. There are minibuses within the Osire Refugees Settlement which take the refugees to and from the nearby town of Otjiwarongo on a daily basis for shopping their basic needs.

295. Before the voluntary repatriation of Angolan refugees started in May 2012, there were approximately 8,500 refugees and asylum seekers resident in Namibia. Since the voluntary repatriation programme was started for Angolan refugees, 2,761 Angolan refugees were repatriated. In addition, three Rwandese and four Burundian refugees were also repatriated voluntarily. This brought the total of voluntary repatriations to 2,768. The Angolan refugees represent 75% of the refugee population.

## 39. Indigenous minority groups

296. Namibia is a signatory to the United Nations Declaration on the Rights of Indigenous Peoples. In addition to the Bantu majority, there are large groups of Khoisan (such as Nama and San), who are descendants of the original inhabitants of Southern Africa. There are approximately 35,000 San people (previously marginalized) in Namibia.

297. Since independence, the Government has resettled the San people to permanent locations and built houses for them across the country. In 2005, Cabinet approved the San Development Programme. The objective of the programme is to ensure that the San people are fully integrated in mainstream society and economy. Various programmes were undertaken thus far since the inception of the programme, including:

(a) Resettlement;

(b) Education for San children under the "back to school and stay at school for San children" initiative;

(c) Literacy project for all the San people;

(d) Establishment of early-childhood development centres;

(e) Employment opportunities: The Government has given directives to all Ministries and Regional Councils to apply affirmative action principles in terms of the law in the employment of San people. In this regard, many of the Ministries including the Ministry of Defence, Safety and Security have relaxed requirements for employing San people in the Defence and Police Forces;

(f) Community conservancy programmes;

(g) San Feeding Programme. Due to extreme poverty among the San people, Government introduced feeding programmes for the San communities on a regular basis.

**40. Gender equality**

298. The Namibian Constitution prohibits gender-based discrimination. Women's civil liberties and freedom of movement are guaranteed by the Constitution. Women's physical integrity is also protected under Namibian laws and there is no restriction on women's freedom of dress. Namibia acceded to the Convention on the Elimination of all Forms of Discrimination against Women in 1992 and ratified its Optional Protocol in 2000 with no reservations.

299. Namibian women have the same ownership rights as men, but are obstructed by cultural practices and traditions. Women are particularly disadvantaged as regards access to land. In terms of the Communal Land Reform Act No. 5 of 2002, traditional authorities allocate the rights to use land to individuals and men and women have equal access to communal land. In addition, many single women with children lack the technical skills to farm the land allocated to them.

300. The Communal Land Reform Act further provides that widows have a right to remain on communal land allocated to their late husbands, even if they had remarried. It further provides that women must be represented on the Communal Land Boards to monitor the implementation of the Act. Out of a total of 170 Communal Land Boards members, 72 are women.

301. There is no legal discrimination against Namibian women in relation to access to bank loans. The Married Persons Equality Act specifies that a partner's consent is not required to obtain loans.

302. Parliament has passed a number of legislation to create an enabling environment for gender equality, including:

(a) Combating of Rape Act No. 8 of 2000 provides an extensive definition of rape that focuses on acts of coercion (force) used by the accused. It prescribes stiff minimum sentences for rape. It gives the complainant (the rape victim) the right to participate in bail proceedings, and imposes bail conditions that will help to protect the rape

victim. The Act requires that rape cases must be heard in closed court and prohibits publications of the information which could reveal the identity of the rape victim.

(b) Traditional Authorities Act No. 25 of 2000 places a duty on traditional authorities to promote affirmative action among the members of that community, particularly by promoting women to positions of leadership.

(c) The Communal Land Reform Act No. 5 of 2002 governs the allocation of communal land. It provides that widows have a right to remain on communal land allocated to their late husbands, even if they remarry. It further provides that women must be represented on the Communal Land Boards.

(d) Combating of Domestic Violence Act No. 4 of 2003 gives an extensive definition of domestic violence, including physical, sexual, economic, verbal, emotional and psychological, intimidation and harassment. It also defines who is in a domestic relationship. It provides for the issuing of protection orders and police warnings in domestic violence matters. It also has a provision which gives added protection to complainants that lay criminal charges against their abusers. The Act gives police-specific duties in domestic violence incidents, including the duty to help complainants get access to medical treatment and collect their personal belongings.

(e) Maintenance Act No. 9 of 2003 stipulates that all parents have a legal duty to maintain their children. Both parents share responsibility for the support of their children, regardless of whether the children are born inside or outside of a marriage and regardless of any contradictory rules under customary laws. The Act sets out procedures for holding maintenance enquiries and for enforcing maintenance orders.

(f) Labour Act No. 11 of 2007 – this Act replaces the 1992 Act and makes more generous provisions for maternity benefits than the old Act. It outlaws discrimination in workplaces on the basis of pregnancy and HIV/AIDS status for the first time, and prohibits sexual harassment and includes a clearer definition of sexual harassment.

(g) The Prevention of Organized Crime Act No. 29 of 2004 specifically criminalizes trafficking in persons including women, slavery, kidnapping, and forced labour, including forced prostitution, child labour and migrants smuggling.

## Article 6

**41. Information on legislative, judicial, administrative or other measures which give effect to the provisions of article 6 of the Convention, and the practice and decisions of courts and other judicial and administrative organs**

**Measures taken**

303. Parliament enacted the Racial Discrimination Prohibition Act of 1999, which criminalizes discrimination on racial grounds, making it punishable in court of law either by imprisonment, a fine or both. There are no specific groups of persons who, from the outset of trial under the Act, can expect a higher or lower sentence for the same offence committed by the other people. In respect of statutory offences, as the case with Racial Discrimination Act, it provides minimum or maximum sentences to be imposed by the court when sentencing. Common law offences are different in the sense that the presiding officer has more discretion on the sentence to be imposed. In the latter situation, the judge will be guided by previous decisions, although each case is judged on its own merits.

### 42. Measures taken to ensure that victims have adequate information concerning their rights

304. Namibia has vibrant NGOs and other institutions that assist victims of racial discrimination in enforcing their rights or obtaining appropriateness and with various other legal issues. For instance, if an individual has become a victim of racial discrimination and needs information concerning his/her rights as an individual, he/she can go to the police stations and discuss the particular issue with any available police officer.

305. If any person has sufficient grounds, the police officer will assist him/her to lay a complaint and open a case, as it is a criminally punishable offence. One can also approach the Legal Assistance Centre or the Office of the Ombudsman for assistance.

### 43. Whether national human rights institutions and Ombudspersons are authorized to hear individual complaints of racial discrimination

306. The Ombudsman has a constitutional duty to provide complainants with remedies as set out in article 91(e) (aa-ff) as follows:

> "Article 91(e): The duty and power to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding paragraphs through such means as are fair, proper and effective, including
>
> (aa) Negotiation and compromise between the parties concerned;
>
> (bb) Causing the complaint and his or her finding thereon to be reported to the superior of an offending person."

### 44. Types of reparation and satisfaction, with examples, which are considered adequate in domestic law in cases of racial discrimination

307. Section 16 of the Racial Discrimination Prohibition Act, which regulates offences of racial discrimination, deals with types of reparations and satisfaction which are considered adequate in Namibian domestic law. This Section 16 provides that:

> "Whenever the court convicts any person of an offence under this Act, the court may, upon the application of the complainant, if he or she has suffered damage as a result of an act in respect of which that person was so convicted, award the complainant compensation for such damage."

308. The provisions of paragraph (a) of subsection (1) and subsections (2), (3), (4) and (5) of Section 300 of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall mutatis mutandis apply to any application and award contemplated in subsection (1).

309. Section 300 of the CPA thus provides that:

> "(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that:
>
> (a) A regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds R 20,000 or R 5,000, respectively;
>
> [Para. (a) substituted by Section 16 of Act 56 of 1979 and Section 20 of Act 31 of 1985]

(b) Where a person is convicted under Section 25(1) of the Children's Act, 1960 (Act 33 of 1960), of having conduced to the commission of an offence, the court may make the award of compensation against such person notwithstanding that the injured person has not applied for compensation."

310. For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

"3. (a) An award made under this section:

- By a magistrate's court, shall have the effect of a civil judgment of that court;
- By a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this Section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

4. Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

5. (a) A person in whose favour an award has been made under this Section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subSection (4).

(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made."

### 45. The burden of proof in civil proceedings for cases involving racial discrimination

311. Under Namibian civil law the one who alleges bears the burden of proof on a balance of probabilities, hence the person who alleges racial discrimination must be able to prove such allegation on a balance of probabilities scale in terms of the Act.

## Article 7

### 46. Information on education and teaching; culture; and information

#### Education and teaching

312. Education is a basic human right guaranteed in both national and international law. The right to education is an indispensable means of realizing most other fundamental human rights. As an empowering right, education is the primary vehicle by which previously disadvantaged groups such as women can lift themselves out of poverty and obtain the means to participate fully in the socio-economic and cultural development of their communities.

313. Education also plays a vital role in empowering women and safeguarding children and social minorities from exploitative and hazardous labour as well as from human trafficking.

314. Article 20 of the Namibian Constitution guarantees to every child in Namibia the right to education. The Education Act No. 16 of 2001, provides for the accessible, equitable, qualitative and democratic national education service; it provides for the establishment of the National Advisory Council on Education, National Examination Assessment and Certification Board, Regional Education Forums, School Boards, Education Development Fund; the establishment of schools and hostels; the establishment of the Teaching Service and the Teaching Service Committee; and for incidental matters.

315. After independence, the Government abolished most discriminatory laws and policies, including the desegregation of the educational system. In addition, the Government has adopted a special programme for speedy integration of marginalized communities into the mainstream of our economy. Under this programme, learners from the marginalized communities have free access to education and receive assistance to support them with all their needs while attending school.

316. Access to education has been greatly improved by the adoption and implementation of the Education Sector Policy for the Prevention and Management of Learner Pregnancy. Among others, one of the goals of this new policy is to promote the continued education of pregnant learners and to ensure the equal treatment of the female and male learner.

317. The National Policy on Orphans and Vulnerable Children (OVC) adopted by the Cabinet provides for the strengthening of the capacity of children and young people to meet their own needs. The National Policy for Educationally Marginalized Children (EMC) is comprehensive and clear in defining categories of educationally marginalized children, and the main reasons for marginalization in education. The Education Act of 2001, the National Early Childhood Development Policy, and the School Health Policy are geared towards addressing school related expenses, providing health care and nutritional support, ensuring a safe and non-discriminatory learning environment and ensuring equal opportunity for all children, especially vulnerable and marginalized children.

318. The Namibia Basic Education Curriculum is based on principles of democracy, equity, tolerance and pluralism. All learning areas and subjects are shaped by these underlying principles.

319. The Government has sponsored a number of human rights education programmes for various Government entities and set up a civil education project to promote human rights education in the school system.

320. In 2006, the Human Rights Documentation Centre at the University of Namibia (UNAM) hosted a workshop for magistrates on human rights education in the criminal justice system. NGOs have also actively promoted the dissemination of international human rights instruments to the general public and some have instituted cases in the High Court where violations of human rights were alleged to have taken place.

321. Various donors have also contributed to the human rights education programmes of diverse human rights advocacy groups. In October 2006, the Southern African Human Rights Trust (SAHRIT) provided training on human rights State report writing to members of the Government's Inter-Ministerial Committee on Human rights and Humanitarian Law. The Magistrate's Commission also trains Magistrates on the application of the international human rights conventions.

322. The principles of the Charter of the United Nations and the Universal Declaration of Human Rights are included in the teachings of high schools, but not those of the Convention itself.

323. There are no reports of cases reported to the Government by any person regarding textbooks that contain demeaning or humiliating content. The Government has no knowledge of the existence of such textbooks or pictures being available in our society.

324. There are books available at all levels of the education system currently in operation in Namibia on the Namibian history and on all the diverse cultures in Namibia. This includes broadcasting on television and radio stations.

325. Law enforcement entities such as the Defence Force, Police and Correctional Service have been provided with human rights education on the key international human rights instruments as part of their training programmes.

**Culture**

326. Article 19 of the Constitution of the Republic of Namibia provides that:

> "Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or national interest."

327. The Ministry of Youth, National Service, Sport and Culture, through the Directorate of Arts and Culture, has been mandated to put the content of article 19 into practical terms. Much positive work in this regard has been done to promote culture and national unity and in addition increasing attention is also being given to the common national and international facets of culture in Namibia.

328. Recognition of the wide-ranging heritage in Namibia constitutes the acknowledgement of the contributions of individual communities and as such can be used to promote reconciliation and national building. High recognition is given to the heritage of the disadvantaged communities in order that their sense of human dignity can be restored.

**Libraries: Community Library Services**

329. Namibia has the following libraries across the country:

- National Library Services
- Ministerial Library Services
- School Library Services
- Public Library Services
- National Archives
- Vocational Training Centres
- Teacher Resource Centres

**National Structures and infrastructures in the country promoting and upholding culture**

- National Museum + Mobile Museum
- National Theatre (decentralization)
- National Art Gallery (heritage collection)
- National Monuments Council (Historic sites)
- Cultural Promotion – (all regions and national programmes)

- Museums Association (national network of community and private museums)
- College for Art (local and national extension programmes)
- National choral and church chorals
- Music network with satellite centres

**Venues hosting cultural activities**

- Windhoek Theatre
- 3 cinemas in Windhoek
- 5 cinemas in Regions
- Approximately there are 700 school halls used for multipurpose events
- Wide network of community-based arts and crafts supported by the Ministry
- Several NGOs have well established craft development programmes, e.g. Rossing Foundation

330. Namibia acceded to the Convention concerning the Protection of World Cultural and National Heritage. Namibia is in the process to enact a law (Heritage Bill and the Education and Culture Bill) which contain provisions of the Convention. Many agreements on bilateral cooperation have been entered providing for cultural, educational, and scientific development.

331. The Government has made it a policy that cultural activities should be held in all the communities across the country. Thus, every year the Government facilitates and sponsors the following activities:

(a) Regional Cultural festivals

(b) National Cultural festivals

(c) Regional and National story-writing competitions

(d) Regional and National song competitions

332. The main aim of these cultural festivals is to promote cultural diversity, and to discourage citizens from discriminating, as well as to advocate and support all groups to practise their cultures.

**Information**

333. A significant level of media freedom does exist in Namibia. Namibia is one of the more media-friendly countries in Africa. Freedom of speech, expression and freedom of the press and other media is guaranteed under article 21 of the Namibian Constitution. Parliament enacted the Broadcasting Act No. 9 of 1991 and the Namibia Communications Commission Act No. 4 of 1992 to provide the legal framework to govern and create a liberal environment for the media in the country.

334. The Namibian Broadcasting Corporation, which is the only public broadcaster, has eight radio services and one television channel. It broadcasts in six languages from Windhoek and in almost all the indigenous languages from the transmitters in their respective areas.

335. In terms of Section 10 of the Racial Discrimination Prohibition Act, it is also explicitly stated that "No person shall publish or display, or cause or permit to be published or displayed, any advertisement or notice that indicates an intention to perform any act prohibited in terms of sections 2 to 9, both inclusive," and in terms of Section 11:

"(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:

(a) Threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) Cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(c) Disseminate ideas based on racial superiority."

336. This is the role State media plays in the dissemination of information to combat prejudices which lead to racial discrimination and to foster better understanding of the purposes and principles of the Convention. This is achieved as these published items are also published in the different languages present.

337. Namibia is a sovereign, secular, democratic and unitary State, founded on the principles of democracy, the rule of law and justice for all. Namibia recognizes the inherent dignity and the equal and inalienable rights of all the members of the human family.

338. Namibia has various human rights institutions such as the Human Rights and Documentation Centre at the University of Namibia, The Legal Assistance Centre, all of which take part in human rights awareness and promotion. The Ombudsman has an active Multi-media Human Rights Campaign. The aim of this campaign is to produce a range of media products to reach as many people as possible on all levels of society with human rights information, including advertisements in newspapers, the printing of pamphlets among other things.

339. Namibian society does not tolerate acts of racism or discrimination, due to the country's past apartheid discrimination. It is also clear that the Constitution of the Republic of Namibia is completely against any form of discrimination as enacted in article 10 of the Constitution.

340. Namibia enacted the Communications Act No. 8 of 2009. This Act establishes the Communication Regulatory Authority of Namibia (CRAN) to regulate communications, including the media, and provides that the Intelligence Services can monitor e-mails and internet usage with authorization from any magistrate for security reasons.

341. Namibia has various cultural festivals each year where different cultural groups take part in performances and other cultural activities. This is a form of raising awareness on the different cultural groups in the country. There are also various programmes on the National Broadcasting Corporation relating to the life of various cultural groups. The LLB degree programme of the Faculty of Law at the University of Namibia also has two customary law compulsory modules as part of its curriculum. These subjects deal with different tribal communities, their way of life, cultures, cultural laws and courts, and traditional leaders.

# End notes/references

## A. Legislation (the law)


1. The Namibian Constitution
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3. The Labour Act, Act No. 6 of 1992
4. The Labour Act, Act No. 11 of 2007
5. Ombudsman Act, Act No. 7 of 1990
6. Legal Aid Act, Act No. 29 of 1990 (as amended 2000)
7. Education Act, Act No. 16 of 2001
8. Combating of Rape Act, Act No. 8 of 2000
9. Combating of Domestic Violence Act, Act No. 4 of 2003
10. Children Status Act, Act No. 6 of 2006
11. Social Security Act, Act No. 34 of 1994
12. Decentralization Enabling Act, Act No. 23 of 2000
13. Racial Discrimination Prohibition Act, Act No. 26 of 1991
14. Anti-Corruption Commission Act, Act No. 8 of 2003
15. Community Courts Act, Act No. 10 of 2003
16. National Disability Council Act, Act No. 26 of 2004
17. Married Persons Equality Act, Act No. 1 of 1996
18. Electoral Act, Act No. 24 of 1992 (as amended)
19. Decentralization Enabling Act, Act No. 33 of 2000
20. Trust Fund for Regional Development and Equity provisions Act, Act No. 22 of 2000
21. National Housing Development Act, Act No. 28 of 2000
22. Communal Land Reform Act, Act No. 5 of 2002
23. Maintenance Act, Act No. 9 of 2003
24. Proclamation 15 of 1928


## B. Case law


1. *Government of the Republic of Namibia and Others v. Mwilima and all the Other Accused* in the Treason Trial 2002 NR 235 (SC)
2. *Myburgh v. Commercial Bank of Namibia* (reported in the 1999 Namibian Law Reports)

## Surveys and reports

1. Namibia Demographic and Heath Survey 2000
2. Population and Housing Census 2001
3. Namibia Household Income and Expenditure Survey 2003/2004
4. Report by Labour Resource and Research Institute, 2007
5. Namibia Labour Force Survey (2004, by H Jauch)
6. Iipumbu and Lebean Survey (1997 University of Namibia)